United States Court of Appeals

for the Second Circuit

APPENDIX

No. 76-1282

United States Court of Appeals for the Second Circuit.

UNITED STATES OF AMERICA,
APPELLEE,

v.

LOUIS C. OSTRER,
DEFENDANT, APPELLANT.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

Appendix to Brief of the Defendant-Appellant.
Volume II.
(Pages 353 thru 731.)

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UNITED STATES COURT OF APPEALS
FILED
SEP 13 1976
DANIEL FIORARO, CLERK
SECOND CIRCUIT

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

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DIRECT EXAMINATION

BY MR. DERSHOWITZ:

Q Mr. Scotti, will you tell the Court what your position was in November 1972 through January 1973.

A I was head of the Rackets Bureau and also Chief Assistant District Attorney during that period of time.

THE COURT: In New York County?

THE WITNESS: In New York County.

Q Did there come a time when Mr. John Fine conferred with you about a wiretap conversation or series of conversations involving a man named Louis Ostrer?

A Well, he would confer with me from time to time on matters he thought required my attention, but if you would pinpoint the nature of the conversation you have in mind I might be able to be more specific in my response to your question.

Q Do you remember a conversation in mid-November of 1972 where Mr. Fine told you about an alleged plan to blackmail or extort or coerce --

A Oh,yes.

Q A federal witness in a federal prosecution involving a Mr. Louis Istrer?

MR. PEDOWITZ: For the record, your Honor, the

date of that conversation was in December of 1972, at least if we were to believe Mr. Fine's diary entries, not November of '72.

A I don't recall the date, but I do recall the incident. I have a vague recollection of Mr. Fine coming to me and telling me that there was a conversation that was intercepted which clearly reflected an attempt to influence improperly a government witness.

Now, that is the substance of what Fine told me at the time. There was a discussion as to what our duty would be.

I agreed with Mr. Fine, I think he was the one who expressed the opinion that we had a duty to communicate the essence of that information to the federal authorities.

I said yes, we have a duty to do that, and accordingly we first tried to find out where this case was pending. I must tell you that I had refreshed my memory before testifying here so you need not be surprised at what may appear to be a reflection of something that took place about two years ago. It is not a spontaneous recollection, I did go over this.

I got in touch with Moss at the time, the U.S. attorney in the Eastern District thinking that that was

pending there and he said no.

Then I got in touch with Silvio Mollo and asked him whether an indictment against one Louis Ostrer, that's the full name, I think, was pending and he said yes. I told him that we have some information which might be of interest to the man who is trying that case and I would like to have a meeting arranged between the attorney, the U.S. attorney, or assistant U.S. Attorney in charge of that case and Mr. John Fine.

I think -- now, these details allude me. I think subsequently the man who was in charge of the case got in touch with Fine and arranged a meeting.

Q Can you tell us what sources you referred to in refreshing your recollection before today's testimony?

A Well, first of all I was told of John Fine's affidavit.

Q Did you read it?

A No. I was told that over the phone by Campriello, the assistant now in the D.A.'s office.

Q He read it to you or simply paraphrased it?

A I don't recall, but I bet he paraphrased it.

Q When was this?

A Some day last week, I believe. I also

spoke with Fine and I also spoke with Mr. Pedowitz.

I also looked at my diary because I made very few entries in my diary, but on that particular day I did make an entry, see, indicating that I got in touch with Moss concerning a matter and then got in touch with Mollo also concerning a matter and arranged a meeting for Mr. Fine.

That was the essence of my entry in the diary.

Q Do you by any chance have that diary with you?

A No, I do not.

Q Would it be possible to get a copy of that relevant page to be turned over to Mr. Pedowitz?

A Yes, I will show it to him.

Q Do you recall now whether you told Mr. Mollo simply that there was a matter in which one of your prosecutors might be interested or did you tell him about the matter in which he might be interested?

A No, I did not because -- in fact it was emphasized that we should not disclose the source of the information.

THE COURT: But you told him it was Ostrer's case?

THE WITNESS: Oh, yes. We told him that.

THE COURT: I think that is what counsel asked

you.

THE WITNESS: I misunderstood him. I thought he meant the source of the information that my associate would communicate to his assistant. That is what I thought you had in mind, is that correct?

Q Let's start from the beginning.

Did you tell him that the matter involved a case against Louis Ostrer?

A I think I did. Otherwise how could he determine whether he had the case pending.

Q Did you tell him that it involved a witness named Aubrey Moss?

A No, I don't think I did.

Q Did you have --

A I merely gave him the general information. I said who's handling this case because my associate, and I don't recall whether I mentioned his name or not, has information which might be of interest to him period.

Q Well, you did say that to the best of your recollection Mr. McGuire -- some associate of Mr. Mollo's then called John Fine, did you not?

A Based on what I was told later.

Q So it is fairly obvious that you must have told him the name of Mr. Fine?

A Oh, I think so. No question about it. No question about it.

Q But do you have any current recollection now, current recollection now as to whether you mentioned the name of Aubrey Moss?

A No. I don't think I mentioned the name.

Q Did you have the name of Aubrey Moss at that time before you?

A Frankly I don't know whether they told me the name of the witness or not. All I was told was, and that was most important to me, that there was an attempt afoot, see, to tamper with the witness.

Q Do you recall whether or not Mr. Fine played any tapes for you before your conversation?

A No. No, I don't think he did.

Q Do you recall whether he showed you any logs, any plant entries?

A No. No. This was -- if I recall it correctly this was an oral recital of the substance of what was intercepted at the time.

Q Do you recall what that substance was?

A Well, the substance was they were trying to, if I recall correctly, scare, in plain ordinary language, a witness into giving testimony that would not

be favorable to the government,see, by letting him know that should he be cross examined they are going to bring out, see, his relationship with a woman or something like that.

Now, that's my recollection of it. We concluded at the time it was highly improper and I had a duty to communicate that to the attorney in charge of that case in order to avoid a possible obstructions of the administration of justice.

Q Were you told at the time that the source of this information was a conversation between Louis Ostrer and his attorney Julius November?

A I really don't remember whether I was told or not, to be honest with you. I really don't.

Q Did you have a discussion with Mr. Fine about whether or not this should be turned over to the federal government?

A We didn't have a discussion. Mr. Fine, was concerned about disclosing the source. I said don't worry about it, there is no need to disclose the source.

All you have to do is to let them know, see, what the fact is. There is no need to disclose the source of that information and I said you make certain that you don't disclose that source. He didn't want it either for

certain reasons he had in mine.

Q You felt it was your duty to turn this over. What did you think the federal government would do with this disclosure?

MR. PEDOWITZ: Objection, your Honor.

A I don't concern myself --

THE COURT: I will let him answer.

A With what their reaction would be. All I knew is I had a positive duty to turn over that information to the U.S. Attorneys.

Q I take it you said you didn't have any sort of discussion with Mr. Fine, there was just a rather hasty conversation?

MR. PEDOWITZ: Objection, your Honor.

THE COURT: You see, that is not a proper form of question. You are asking a witness who is under oath to decide whether it was hasty or not and how can he be prosecuted for perjury on a question like that. The questions have to have some precision to them.

Q I asked you whether you had a conversation or a meeting with Mr. Fine. What is the answer to that question?

A Did I have a meeting with Mr. Fine?

Q Did you have a meeting with Mr. Fine about this?

A I thought I made that clear previously. He came to see me.

Q Approximately how long did your meeting take place?

A I don't recall.

THE COURT: He was present when you telephoned these peopl , Moss first and then Mollo?

THE WITNESS: Ithink he was. Yes, I think he was.

Q You don't recall how long your meeting with him was?

A Gee, I don't think it was more than five minutes, ten minutes, who knows, and frankly I am guessing. I really don't recall the length of the conversation.

Q Your intention in conveying this information to the federal government was that it hsould be careful with this Mr. Moss?

MR. PEDOWITZ: Objection.

THE COURT: He may be asked what his intention wa

A Would you repeat that question?

THE COURT: Reframe the question. I am sustaining the objection to th c question.

Q Was it your intention in conveying this information to the federal government that the federal government would be on guard, would be careful in the way it used Mr. Moss as a witness?

A Well, I would give this information to the federal government in order to prevent a consummation of an obstruction of justice in plain language.

Q I take it you believed it was within your authority to indict Mr. Ostrer for an obstruction of justice or for a coercion of a witness if you felt that one was occurring, is that correct?

MR. PEDOWITZ: Objection, your Honor.

THE COURT: Sustained. He can't indict anybody.

MR. DERSHOWITZ: I'm sorry, your Honor.

Q I take it that you felt that it would have been proper for you to present this case to the grand jury for indictment on a state charge had you felt there was a sufficient basis for the grand jury to conclude that a coercion of a witness was occurring, is that correct?

A Strictly speaking --

MR. PEDOWITZ: Objection.

THE COURT: Don't you have to have an overt

act on that kind of a charge?

THE WITNESS: Not only that, your Honor, but my understanding of the law is that when there is an obstruction of federal justice I don't think we have jurisdiction over it.

Q So it is your --

THE COURT: Don't you have to do it --

A I have a duty to prevent -- I have a duty to prevent any obstruction of justice that might be consummated in any court, whether it is the state court or the federal court and that's the way I saw my duty.

THE COURT: Isn't it true, Mr. Scotti, that no crime had been committed so long as they were only talking about what they were going to do?

THE WITNESS: That is correct, your Honor.

THE COURT: All right, let's go on. That's all you have, was talk.

THE WITNESS: That's right.

Q So I take it that you gave them only enough information, that is you instructed Mr. Fine to give the federal government onlyenough information to prevent the obstruction of justice from taking place by not putting Mr. Moss on the witness stand?

A Let me put it this way. To alert them.

THE WITNESS: Don't put in facts that I didn't say.

THE COURT: Don't --

THE WITNESS: It's a discipline I react to. Don't do that.

THE COURT: I react to it also, but it is unfrotunate that the very people who do that say the Clare Committee is wrong in the premise that we should have the better standards in the law schools and they are wrong that we say we should tell the law schools they should teach and they should teach trial practice, but that is a whole other question.

THE WITNESS: It is another question. It is a matter of candor. He is corporating something which I never testified to. After listening to the tapes. He is assuming that I said I listened to the tapes.

THE COURT: All right, Mr. Scotti, next question.

MR. DERSHOWITZ: I think if the question were read back --

THE COURT: Next question.

Q The next question is is it not true that you made no independent determination by either listening to the tapes or reading the logs that an obstruction of justice

THE COURT: Wait just a moment. I don't know how there is any basis for that kind of question. The federal government had the power to put Moss in protective custody so he couldn't be tampered with. That is the custom in this country, you know. You lock up the jury and you lock up the material witnesses and you let the defendants walk the streets.

Q Did you make any --

A I had a duty, sir, to alert the government to this plan or attempt to tamper with the witness for the government.

Q You yourself, though, made no independent determination listening to the tapes or reading the logs as to whether an obstruction of justice took place?

A You are saying something which Inever said. Listening to the tapes. I never said that I listened to the tapes to begin with.

Q That's my question.

A You know, I react at that. A trained lawyer should not incorporate facts in a question which have not been acknowledged previously.

THE COURT: Mr Scotti, please give this gentleman a break. He teaches young lawyers, but he doesn't teach them how to frame a question.

was going on?

A That question is unfair.

MR. PEDOWITZ: Objection, your Honor. It calls for a conclusion of the witness. The witness has already testified as to the fact.

THE COURT: Yes, the witness already testified that he already read the logs prior to calling Mr. Mollo. The witness may also be asked the separate question whether he listened to any of the tapes prior to telephoning Mr. Mollo. Those are simple questions which a man can answer yes, I did or no, I didn't.

A As you asked me before, I said the only recollection I have is Fine giving me an oral recital of what the conversation was. I have no recollection of the conversation being played back. Frankly, his oral recital was sufficient to alert me to the nature of what was going on.

THE COURT: Did you look at any of these plant reports before telephoning Mr. Mollo?

THE WITNESS: No. No, I did not. You don't need to.

Q Did you discuss with Mr. Fine what you expected, you or Mr. Fine expected the United States Attorneys office would do with this information that you were feeling

responsible to convey to them?

A That was not within the realm of my responsibility.

MR. PEDOWITZ: Objection.

THE COURT: Just answer him yes or no, did you discuss. The objection is overruled.

A Would you repeat that question, please?

Q Did you discuss with Mr. Fine what expectation you had as to how the government,the federal government would use this information which you were going to convey to them?

A No, I did not.

Q Did you discuss with Mr. Fine any possible constitutional problems that might affect the federal prosecution of Mr. Ostrer as a result of receiving state wiretap information?

A No, I have no recollection of discussing that at all.

Q Did you discuss with Mr. Fine the constitutional questions that would arise as a result of a federal prosecutor receiving information as to a conversation between a lawyer and a client?

A No, that never came according to my recollection. It never came up.

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Q You didn't mention you thought Mr. Fine had some other reason for not wanting to disclose the source of information?

A I recall the specific reason, but he was adamant in not disclosing the source. As a policy over the years we always protected the secrecy of operational orders for obvious reasons, because any lack of secrecy would affect or diminish the effectiveness of the wire tap order.

Q It was your feeling that --

A -- and we had to maintain the utmost secrecy unless duty in certain situations would compel us to disclose, you see, the order itself. But this wasn't that kind of situation at all. All you had to do here was give the essence of the intercepted conversation and that was sufficient to alert the government to what the peril was.

Q Was it your belief at the time that if you had conveyed the source of the information to Mr. McGuire your wiretap would have been compromised?

MR. PEDOWITZ: Objection, your Honor.

THE COURT: I thought that's what the witness was just telling us, that it was a possibility. It is a repetitious question. I will let him answer it, though.

Overruled.

A I made it clear that we had a rigid policy over the years not to disclose our wiretap orders. In this case there was no need to disclose it, not need at all.

THE COURT: But the purpose of doing that was to protect it from being compromised?

THE WITNESS: And protect the secrecy, which would mean you wouldn't jeopardize the investigation by protecting the secrecy.

Q You did testify that in addition to that reason you believed Mr. Fine had another additional reason. Would you tell us what that reason was?

A I don't recall that, to be honest with you. Of course he was a very conservative fellow, too, and, to use the parlance, he played it close to the chest, you see, and he was very -- while he recognized his duty, that's why he came to me, at the same time he was concerned about our investigation and didn't want any disclosure of any kind to jeopardize our investigation.

I said very simple. Let's tell him the essence of the information and don't reveal the source. Tell him in plain language or substance the information came to our attention that so and so is going to happen.

Q In other words, you authorized him to make full

disclosure to Mr. McGuire but for the source of the information?

A You are putting words in my mouth. I didn't say full disclosure. I said I authorized him to make a disclosure of the nature of the information gleaned from the intercepted conversation. That doesn't mean full disclosure.

Q Did you impose any conditions on his disclosure other than the source of the information?

A I frankly had no need to disclose any information because he felt very strong about not revealing the source as well as I did.

Q Did you, however, impose any condition?

MR. PEDOWITZ: Objection.

A There was no need.

THE COURT: If he gave any directions to Mr. Fine --

A I told Mr. Fine, "Make certain you don't disclose the source."

Q You gave him no other directions?

A No.

Q Did he come to you in March or April 1975 and ask for permission at that time to disclose the source of the information to Mr. McGuire?

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A No.

Q Did he come to you in March or April 1973 and ask for permission at that time to disclose the source of the information to Mr. McGuire?

A April?

Q March or April of 1973.

A I don't recall that at all.

Q You did not discuss that?

A I have no recollection of that.

MR. PEDOWITZ: Objection, your Honor.

THE COURT: It's asked and answered. I will let the answer stand.

MR. DERSHOWITZ: No further questions of this witness, your Honor.

MR. PEDOWTIZ: No questions.

THE COURT: Thank you, Mr. Scotti. You are excused.

(Witness excused.)

MR. PEDOWITZ: Your Honor, Mr. McGuire is also available now.

THE COURT: Are you calling Mr. McGuire, Mr. Dershowitz?

MR. DERSHOWITZ: We are calling Mr. McGuire, but we have no preference as to Mr. McGuire or Mr.

Garabedian, who is waiting, also.

MR. PEDOWITZ: I request Mr. McGuire, as I know he has urgent matters.

MR. DERSHOWITZ: No objection.

H A R O L D F. M C G U I R E, called as a witness, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DERSHOWITZ:

Q You were the Assistant United States Attorney in charge of the Ostrer prosecution, were you not?

A For a time; yes, sir.

Q Can you tell us for which time you were in that position?

A From approximately the beginning of 1972 through its conclusion.

Q Its conclusion being January of 1973?

A No. I was also in charge of appellate proceedings following that time.

THE COURT: When did you cease having any connection with the case?

THE WITNESS: Well, there were still elements of it going on when I left the United States Attorney's Office in October -- I beg your pardon, in February of

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1974.

Q Did there come a time when you received a communication from Mr. Mollo relating to a call from the District Attorney's Office involving the Ostrer matter?

A Yes, sir.

Q And can you tell us exactly what you were told by Mr. Mollow in that conversation?

THE COURT: Listen carefully to his question. He is asking you, can you tell us exactly what you were told, so you will answer that yes or no.

THE WITNESS: I can't answer it quite yes or no, your Honor.

THE COURT: Can you or can you not tell us exactly what you were told? A silly question deserves a silly answer.

Ask him for the conversation.

THE WITNESS: Not precisely.

THE COURT: Ask him for the conversation. Don't spring it out.

MR. DERSHOWITZ: I would like to find out if he refreshed his recollection from sources.

THE COURT: Ask him that after he tells you the conversation, or before, if you like.

Q Did you make any notes of thatconversation?

A N. I am sure I didn't.

Q Will you tell us exactly what you were told in that conversation?

A To the best of my recollection, Mr. Mollo telephoned me and he said, in substance, "Are you in charge of the prosecution of a guy named Ostrer?"

THE COURT: Mollo didn't know that?

THE WITNESS: I don't know whether he did or not but he asked me that question.

THE COURT: All right.

A And I said, "Yes, sir."

And he said, "Do you know Al Scotti at the DA's Office?"

And I said, "No, I have never met him."

Mollo said, in substance, "Well, I just got a call from him and he would like you to come over and meet with him or one of his subordinates" -- I don't remember which -- "he has something to tell you with relation to that case."

That's about all there was to the conversation.

Q He did not mention to you the name Aubrey Moss?

A Certainly not.

Q Did he mention to you any possible obstruction

of justice, coercion of a witness, or extortion or blackmail?

A You are talking about Mollo?

Q I am talking about did Mollo tell you.

A Absolutely not.

Q Did this conversation occur with Mollo on the phone or face to face?

A On the phone.

Q At that point what did you do?

A To the best of my recollection Mr. Mollo gave me the name of an assistant district attorney whom I telephoned to make an appointment. Now, that assistant DA was either John Fine or his superior, I don't recall which. In any event, I telephoned the DA's office, and made an appointment to come over and see a man who turned out to be John Fine.

Q Do you recall who was at that meeting with John Fine?

A Who?

Q Yes.

A Well, I'm sure he was there. To the best of my recollection there were also one or more policemen. I don't remember their names. I had never seen them before or since.

Q Did you take any notes at that meeting?

A Not to the best of my recollection, I have searched for some, and I do not recall taking any, and I have not found any.

Q Was it your practice to take notes of meetings with other attorneys?

A It varied. Sometimes I did. If the matter seemed to be of importance, I certainly would.

Q Did you make a memorandum of the subject afterwards?

A No.

Q Did you communicate the conversation to anyone else in the U. S. Attorney's Office when you returned from the meeting?

A I don't recall. You are Mr. Dershowitz?

Q Yes, sir.

A I don't recall, Mr. Dershowitz, whether I did or not.

Q Who was your assistant in charge of the prosecution at that time?

A Andy Schaffer. S. Andrew Schaffer.

Q Do you recall whether or not you told Mr. Schaffer of your meeting with Mr. Fine?

A I don't recall specifically. I might have.

Q You might have told him?

A I might have. I am inclined to doubt it, but I might have.

Q Did you tell anybody else working with you on the case?

A It is also possible that I told Mr. Mollo of the fact that I had been there, and it is possible that I told the SEC investigator who was working with me on the case, Meyer Goldman, but, frankly, the matter was of little importance to me at the time so I am inclined to doubt all of those.

Q Did you commence after the meeting that you are describing, or set in operation, any investigation of an obstruction of justice involving a Mr. Moss?

A No. I didn't even consider it at that time.

Q Did you speak to Mr. Moss about it?

A After that meeting?

Q Did you after that meeting talk to Mr. Moss in order to elicit from him information as to whether there was an obstruction of justice involving him?

A No, sir.

Q At any time did you speak to Mr. Moss about that matter?

A To the best of my recollection, never.

Q At the time of your meeting with Mr. Fine, did

you have an outstanding subpoena on Mr. Moss for his appearance at the federal trial?

A I don't recall specifically because I don't remembe precisely the date on which I met Mr. Fine. I had previously talked to Mr. Moss.

Q Would it refresh your recollection if I were to tell you that the government in this case has indicated the meeting occurred on December 22, 1972?

A That sounds about right.

Q Now, having that date in mind, can you tell us whether on December 22, 1972, there was an outstanding subpoena directing Mr. Moss to appear at Mr. Ostrer's trial?

THE COURT: Isn't that a matter of public record?

MR. DERSHOWITZ: We don't have it, your Honor.

THE COURT: What is the story on that?

MR. PEDOWITZ: It is not a matter of public record. It is contained in our files. I do have that here.

MR. DERSHOWITZ: We can pass on this in the expectation we will get that information.

THE COURT: All right. He can be asked his knowledge or his recollection, but there must be a record

here in the courthouse of when subpoenas are issued.

Q Do you have any current recollection as to whether or not Mr. Moss was under subpoena at that time?

A I have a refreshed recollection, Mr. Dershowitz.

Q Will you tell us (a) how you refreshed your recollection; and (b) what that refreshed recollection is?

A Yes. I cam to the United States Attorney's Office one day last week, and I looked through the subpoena files.

Q What did you discover?

A I discovered there was a subpoena. I don't recall the date on it, however.

Q Is this it, Exhibit 10?

THE COURT: Can't you state the date on it for the record?

MR. DERSHOWITZ: We would like to admit that into evidence.

(Defendant Exhibit No. 12 was marked for identification.)

Q Is this the subpoena that you discovered?

A That is an orginal subpoena that I caused to be served, and it is dated November 30th.

MR. PEDOWITZ: There is one other record contained

in our files I am now turning over to Mr. Dershowitz which is relevant to a subpoena.

THE COURT: Mark it for identification. Your statement on the record means nothing unless the paper has a number on it. What is the paper?

MR. PEDOWITZ: It is a note from Mr. Moss which indicates that he has been recontacted by the United States Attorney's Office sometime in late December of 1972 -- I believe it was December 27th -- by Meyer Goldman, an SEC investigator, and told that he need not appear at the beginning of the trial on January 4th, but that he ought to be on standby.

THE COURT: Mark it for identification.

(Government Exhibit X was marked for identification.)

MR. DERSHOWITZ: We would like to mark it and admit it in evidence.

MR. PEDOWITZ: No objection.

(Government Exhibit X marked for identification was received in evidence.)

Q To the best of your recollection, do you recall the time of the day on which the meeting with Mr. Fine occurred -- morning, afternoon or evening?

A I have a recollection that it was in the late

morning sometime, but I am not positive of that.

MR. DERSHOWITZ: Your Honor, I need a few seconds to look at this, which is a new piece of information.

(Pause.)

Q At the meeting itself, in Mr. Fine's office, do you recall being told about a man by the name of Jim Lynch?

A I'm not sure I know who Jim Lynch is. Again on this subject my recollection has been refreshed somewhat, and if that's the name of the former FBI agent who was working for Mr. Ostrer at the time I have a dim recollection of the man mentioned by that name.

Q Can you recall whether or not you were told a man by the name of Jim Lynch was Mr. Ostrer's investigator on the federal case?

A Probably is the best way I can answer that. I didn't remember it until the matter was brought to my attention some days ago. I think I probably was told.

Q Do you recall also being told that same Mr. Jim Lynch was then a Federal Bureau of Investigation agent?

A No

Q Did you have occasion to check to see whether or not Jim Lynch had ever been an employee of the Federal

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Bureau of Investigation?

A I don't think so, Mr. Dershowitz. It is pos sible, but I don't think so.

Q Do you now know whether or not Mr. Jim Lynch was an employee of the Federal Bureau of Investigation at a ny time?

A Well, not that it was a matter of tremendous importance to me, sir, but during the trial which went on f or some weeks of Mr. Ostrer in January of 1973 I met the fellow Lynch, and I believe he told me he had been formerly an FBI agent.

Q Did he tell you when he terminated his employment with the FBI?

THE COURT: Does it matter a bit what he told him in January of 1973 as to when he terminated his employment with the FBI?

MR. DERSHOWITZ: We are trying to save time.

THE COURT: It doesn't save time when he told him in January of 1973 he terminated his employment with the F BI. It doesn't matter a bit.

MR. DERSHOWITZ: We would like to establish he quit the FBI in 1954.

THE COURT: Will you concede that?

MR. PEDOWITZ: If Mr. Dershowitz represents

that to be a fact.

THE COURT: Then he quit the FBI long before this case began.

Q Were you also told at that meeting that Ostrer "had something on Moss"?

A I don't think that's the way it was put.

Q May I ask you to look at your own affidavit?

A Sure.

THE COURT: State the date of the affidavit.

MR. DERSHOWITZ: The date of the affidavit is -- unfortunately, it is blank date of November 1974. There is no date on this copy.

Q This is the first of the two affidavits you filed in the case, and you stated, "He told me that Ostrer had something on Moss.'"

Does that refresh your recollection that you were told that he had something on Moss?

A It doesn't refresh my recollection as to the exact words, sir, but the substance of that was certainly communicated to me.

Q Were you also told that if Mr. Moss testified at the trial that there would be derogatory evidence introduced against him?

A No, I'm sure I wasn't.

Q Were you told that you ought to be careful with Moss?

A I don't think Mr. Fine presumed to tell me how I ought to try my case. He did say there was some information that he had come into the possession of that he thought I ought to know, but it was obvious from our conversation that Mr. Fine didn't know anything substantial about the nature of the case that I was about to try, and he wasn't about to tell me how to try it.

Q Did he know there was a witness, Aubrey Moss, who was a possible witness in the federal case?

A He told me that. Would you like to know what I told him?

Q Not yet.

THE COURT: I don't think he wants to know anything except answers to his questions. Please don't volunteer information.

Q Did you tell him that the District Attorney's Office wished to head off any possible obstruction or miscarriage of justice?

THE COURT: I'm sorry, I didn't get that question.

Q Did you tell Mr. Fine that it was the intention -- I'm sorry. Did you tell Mr. Fine -- did Mr.

Fine tell you -- I'm sorry -- that it was the intention of the District Attorney's Office to head off any possible obstruction of justice?

A In substance, he told me that; yes, sir.

Q Did he tell you who the participants were in the conversation involving a potential obstruction of justice?

A He didn't tell me there was a conversation, to the best of my recollection.

Q He never told you that there was discussion between a Mr. Ostrer and his lawyer, Mr. November, about obstruction of justice?

A Definitely not.

Q Did the name, Mr. November, come up in the conversation at all?

A I don't recall. It is possible that it did.

THE COURT: Who defended Mr. Ostrer in the case that you tried?

THE WITNESS: Maurice Edelbaum, sir.

THE COURT: Was Mr. November present at the counsel table?

THE WITNESS: Mr. November, whom I had had occasion to run into many years before, was present during most of the trial. I don't believe he ever sat at the

counsel table. I think he sat in the audience when he was there.

MR. DERSHOWITZ: We will establish that through out testimony.

THE COURT: Do you dispute that?

MR. DERSHOWITZ: In part, yes, sir. We will get into that.

THE COURT: Get into it right now. Let's not waste time flitting about.

MR. DERSHOWITZ: We will get into that by addressing Mr. November, not him, as to what his role was in the defense of the case.

THE COURT: You didn't ask his role. The question was whether he was there at the counsel table, and the witness said he wasn't, but he was in the courtroom. Do you differ?

MR. DERSHOWITZ: Yes.

THE COURT: You say he was at the counsel table?

MR. DERSHOWITZ: We believe he was at the counsel table on occasion.

THE WITNESS: My recollection is definitely to the contrary.

MR. DERSHOWITZ: Okay. We will establish that.

THE COURT: Next question, please.

Q Did you inquire of Mr. Fine as to the source of his information?

A I don't remember whether I inquired or not, but I know very well that he didn't tell me. I probably did inquire.

Q And do you remember what he told you in response to your inquiry?

A He told me nothing that had any meaning to me.

THE COURT: What did he tell you? The Court will decide whether it has any meaning.

THE WITNESS: To the best of my recollection, sir, Mr. Fine told me that there was a very sensitive investigation going on in his office, that he was loathe to reveal any part of it for his own reasons, but that in the course of that investigation it had come to his attention that Aubrey Moss might in some way be compromised by Ostrer -- and, I believe, by Julius November, although I am not sure about the November part.

Q You did realize at the time from your previous experience that Julius November was an attorney?

A I had known Julius November in his capacity as a prizefight manager, or one associated with prizefight

managers, but I believe I knew that he was technically admitted to the bar, yes.

Q And did you know --

A I also had independent knowledge, or believed, that he was not a legal practitioner at the time, that he wasn't involved in active practice, but I can't vouch for that one way or another. That's Mr. November's business.

Q Can you disclose the source of that information?

A Yes. Many years before I had represented Time, Incorporated in a lawsuit in which Julius November had been the plaintiff, and Time, Incorporated had been the defendant. It was a libel suit that had arisen out of November's association with Floy Patterson, and I got to know something about Mr. November in the course of that. I was present at a deposition that Mr. November gave.

Q But you were aware at the time that he was a member in good standing of the bar?

A I don't know to this day his standing, but I knew he had a law degree.

Q And you knew nothing inconsistent with the fact that he was a practicing lawyer at the time?

THE COURT: I think he has just told us that he understood he was connected with Floy Patterson.

Q Did you ask Mr. Fine how he managed to get access to conversations between Mr. Ostrer and Mr. November?

MR. PEDOWITZ: Objection.

THE COURT: Wouldn't you like to hear the answer to that?

MR. PEDOWITZ: No.

THE COURT: Overruled. I would.

A I thought I had made it clear before, but --

THE COURT: No. Just answer the question.

A It is certainly clear to me that Mr. Fine told me nothing which would indicate directly or by implication that the source of his information came from conversations between Mr. Ostrer and Mr. November, whether attorney-client or any other kind.

Q But he did tell you that he thought there might be an obstruction of justice involving Mr. Ostrer and Mr. November, and a witness named Aubrey Moss?

A In essence he told me that, sir.

Q And at that point I take it it is your testimony that you inquired, and you wondered what the source of that information was?

A I believe Imade an inquiry, Mr. Dershowitz. And I believe I got nowhere with it. I know I also said

at the time to Mr. Fine that he didn't have to worry, that under any circumstances it was not my present intention to call Aubrey Moss as a witness.

Q Did you not in fact tell Mr. Fine that you had "about decided not to use him as a witness at that time"?

A We could quibble all day. I don't remember the exact words, but I certa-nly recall conveying the impression to Mr. Fine, which was accurate, that Mr. Moss did not figure in my trial plans.

Q Did you not --

A To make it wholly accurate, I had not at that time, nor did I ever until the trial was concluded, absolutely mathematically rule out the possibility of calling Mr. Moss as a witness.

However, he was a very unimportant witness to my case, had he been called at all, and he did not figure in my trial plans from the first day I interviewed him until the end of the trial.

Q But you did issue a subpoena for him?

THE COURT: That we know. Don't argue with the witness. The Court knows he issued a subpoena. The subpoena is in evidence. Why do you have to ask a question like that? Get this man finished.

Q Did you not call him before the grand jury in the Ostrer case?

A I did not handle the grand jury presentation in the Ostrer case.

Q To your knowledge, was he called before the grand jury in the Ostrer case?

A I believe he was.

Q How many witnesses were called before the grand jury in the Ostrer case?

THE COURT: What possible difference could it make --

MR. DERSHOWITZ: If there were few witnesses, and he was one of them --

THE COURT: It doesn't make a bit of difference.

Q Was he called by the Securities & Exchange Commission in preparation of the Ostrer case?

A His testimony was taken by the SEC during the preliminary investigation of the Belmont Franchising manipulation, yes, sir.

Q And was he interviewed by you in preparation of the Ostrer case?

A Briefly.

Q Can you tell us for how long that interview

took?

A It couldn't have been more than a half hour.

Q Did he volunteer to come in as a witness, or did you call him in as a witness?

A I am sure I asked him.

Q Did you not tell him that he had a choice, either he could be subpoenaed or he could volunteer -- he could testify voluntarily in the case?

MR. PEDOWITZ: Objection.

THE COURT: Sustained.

Next question, please.

Q Did you not state in your affidavit that the only information that you received from Mr. Fine dealt with Mr. Moss?

A I don't know which affidavit you are talking about, and if you really want to ask me what I said in my affidavit I would like to look at it.

Q Fine. (handing to witness.)

Would you read through this affidavit while I get you your second affidavit.

THE COURT: While he is reading those I will take about a five-minute recess. You can step down and read both affidavits.

(Recess.)

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THE COURT: Let's resume.

BY MR. DERSHOWITZ:

Q Have you had an opportunity to read the affidavit that you filed?

A Yes, I have, sir, and the answer to your question is "no."

MR. DERSHOWITZ: Will the reporter read the question to which the answer is "no"?

THE COURT: No. This is being prolonged unduly. I will read the record in this matter.

Next question.

These pauses between questions are getting a bit burdensome to the Court at this late hour.

Q Did you not state in the affidavit: "My prior affidavit clearly states that the only information which I received irectly or indirectly from the District Attorney's Office was that a possible obstruction of justice might be under way with respect to a prospective government witness"?

A You are, I believe, quoting correctly from my affidavit; yes, sir.

Q Is it not the fact that you also received information about Mr. Ostrer's investigator in the federal case?

A It is possible that I did in passing, Mr. Dershowitz. I didn't remember it at the time I wrote my affidavit, and I am still not 100 per cent sure of it today, but it is possible that I did.

Q So you are not completely sure as to exactly what transpired at that meeting?

A No. Certainly anything that was mentioned with respect to this FBI agent was very much to the side and was not important. I do remember some things that happened at that meeting quite well.

Q Did you state in your affidavit of January 1975 that you conversation with Assistant Ditrict Attorney Fine "reinforced my determination not to call Moss"?

A I'm sure you are quoting correctly from my affidavit.

THE COURT: Exactly what did you mean by that?

THE WITNESS: Well, your Honor, I had interviewed Mr. Moss in November sometime, and my own reocrd will get the date if that becomes important. I had determined as a result of that interview -- and I believe I communicated that determination to various of my associates -- that I didn't believe what Mr. Moss was telling me, and that I did not intend to call him as a witness.

When I went to Mr. Fine's office and Mr. Fine told me that he had information to the effect that Moss was or might be being interfered with by somebody else that certainly didn't have the effect of persuading me to call him as a witness. I had already decided as a matter of trial strategy that I probably wouldn't, but the effect of information of that kind certainly wouldn't be to reverse that determination, and it wasn't.

I might add that nothing happened during the course of the trial which would have given me the remotest cause to call Aubrey Moss as a witness.

MR. DERSHOWITZ: No further questions of this witness, your Honor.

MR. PEDOWITZ: Your Honor, I don't wish to burden you, but I have to lay a foundation for a few of my questions, and it may seem to be going off on a tangent for a moment.

CROSS EXAMINATION

BYMR. PEDOWITZ:

Q Sir, can you give us a brief description of the federal trial against Mr. Ostrer?

THE COURT: Isn't that entire trial minutes before me on this motion?

MR. PEDOWITZ: They are, but this will put into

perspective the next few questions I want to ask.

THE COURT: Ask the questions, because the Court will look through the trial record. At least I assume I am required to in order to get the significance of this matter.

MR. PEDOWITZ: I will ask the questions then, sir.

Q Mr. McGuire, was Ostrer's trial a stock fraud case?

A It was a stock manipulation case.

Q Was the government's proof at the trial to the effect that Mr. Ostrer had participated in a manipulation of the stock of Belmont Franchising?

A Yes. That would be putting a very simple description on a fairly complicated series of events, but that is true.

THE COURT: How about the interview sheet on Moss? Is that available?

MR. PEDOWITZ: Yes, your Honor, we will get to that.

THE COURT: All right.

Q Sir, in connection with this case, was the government's proof also to the effect that Mr. Ostrer had to borrow a good deal of money to purchase shares of

Belmont Franchising?

A If I can give a slightly rambling answer to that --

THE COURT: I prefer you not, because I have had a rambling hearing all day. Everybody in this hearing has been rambling and I have had enough rambling. I want to continue this hearing. I will assume that you had an indictment, that you tried the charges set forth in the indictment to a jury, and that you produced whatever evidence you had that was relevant to the matter set forth in the indictment.

I don't think anyone disputes that here. I think it is important to know what information Mr. Moss had or purportedly had.

MR. PEDOWITZ: That's what I am getting to, to put it into some kind of perspective.

THE COURT: I don't want perspective. I want to conclude the hearing.

Q There came a time in 1972 you interviewed Aubrey Moss, is that correct?

A Yes.

Q I show you a document marked Government Exhibit D for identification, and ask you if that is a xerox copy of a page from your diary.

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A Yes, it is.

Q Does it reflect the fact that youinterviewed Aubrey Moss?

A Yes.

Q On what date?

A Actually, it more accurately reflects the fact that I had an appointment to interview him, and I did.

THE COURT: Didn't you make a memorandum of the interview?

THE WITNESS: No, sir. Not that I recall.

THE COURT: You mean you don't generate 3500 material any more in your office?

THE WITNESS: Your Honor, Mr. Moss turned out not to have anything of particular interest to me.

THE COURT: Don't you have a printed form where you read him his rights, tell him who you are, and ask him what you want to know?

THE WITNESS: He wasn't a defendant or a putative defendant. He was just a witness, and not a very important witness at that.

Q Does this reflect how long you interviewed this man for?

A It reflected I had set aside an hour within which to interview him, and I certainly didn't take the

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full hour.

THE COURT: And you made no notes of what he told you?

THE WITNESS: Not that I recall, sir.

MR. PEDOWITZ: I offer Government Exhibit D.

MR. DERSHOWITZ: No objection.

(Government Exhibit D for identification was received in evidence.)

THE COURT: I thought that was standard practice in your office, to make notes in order to prolong the length of trials.

THE WITNESS: I didn't follow that practice, sir.

THE COURT: I wish you would come back to work for the United States Attorney in this district.

Let's go.

Q Sir, prior to interviewing Mr. Moss had you reviewed his grand jury testimony and his SEC testimony?

A I am sure I did.

Q I show you, sir, documents that have been marked Government Exhibits E and F for identification, and ask you if you can identify those documents.

MR. DERSHOWITZ: May the record reflect we have not seen any of those documents and would like an

opportunity to study them.

THE COURT: If they go into evidence you can study them, certainly.

A Exhibit E is a transcript of Moss' testimony before the SEC, and Exhibit F is a transcript of his grand jury testimony.

MR. PEDOWITZ: We offer Government Exhibits E and F, your Honor.

(Government Exhibits E and F for identification were received in evidence.)

THE COURT: Show them to Mr. Dershowitz.

MR. PEDOWITZ: I intend to, your Honor.

(Documents handed to counsel.)

Q Sir, as you understood it from Mr. Moss's grand jury testimonyand his SEC testimony, what was Mr. Moss' role in this particular affair?

A Mr. Moss was one of a number of sources that Mr. Ostrer had for obtaining money with which to buy Belmont Franchising stock. His role, Mr. Ostrer's role, in the Belmont stock manipulation was to buy one half of the outstanding stock of the corporation, in round figures, at a particular time, at a particular price, so that he and his confederates could obtain the entire outstanding issue of stock and so that various individuals who were brokers

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under their control could thereafter trade small amounts of stock on what appeared to be a public market while the price of the stock rose.

It was then the testimony of the witnesses against Mr. Ostrer at trial that the plans of the conspirators were to pay off brokers to put this worthless stock into the hands of innocent members of the public.

Mr. Moss provided, so I recollect, approximately ten per cent of the funds that Mr. Ostrer used to acquire his half of the Belmont Franchising stock issue.

Q Sir, would that have been about $38,000 for approximately 2000 shares of the stock?

A Yes, sir.

Q And the entire 50 per cent of the stock would have been 14,000 shares, because the whole stock issue was approximately 28,000 shares?

A Yes.

THE COURT: Is it relevant where he got the money?

THE WITNESS: It turned out not to be relevant for purposes of the trial.

Q Do you recollect, sir, whether you asked Moss whether Louis Ostrer had ever told him he knew the stock would go up because it was being manipulated?

MR. DERSHOWITZ: Objection, your Honor. This is so far out of --

MR. PEDOWITZ: I am attempting to show Mr. Moss had very little to contribute to this particular trial.

THE COURT: This is also very interesting. Here this witness says that he believed the fellow was a liar, that he had nothing to contribute, and then the New York County DA infers from the wiretaps that he is a witness sufficiently important to be worth intimidating or coercing, and then I am told further that the coercion is they are going to tell somebody he had an adulterous affair with some woman.

MR. PEDOWITZ: And the tapes will reflect the fact Mr. Ostrer thought he was far more important than Mr. McGuire thought he was.

THE COURT: You can't have it both ways.

MR. PEDOWITZ: I submit in fact it was both ways.

THE COURT: I will permit the question.

Q Do you recollect, sir, whether you asked Mr. Moss whether Louis Ostrer had ever told him that he knew the stock would go up because it was being manipulated?

A I am sure I asked him questions to that effect.

Q Sir, did he deny to you, as he had in the grand jury, and in the SEC investigation, that Mr. Ostrer communicated any information to him that would indicate that the stock was in fact being manipulated?

A I believe so, in substance.

THE COURT: Did he tell you anything in your interview inconsistent with his grand jury testimony and his SEC testimony or either of them?

THE WITNESS: No, I don't recall that he did, your Honor.

THE COURT: Did he tell you anything in addition to what was set forth in the SEC or the grand jury?

THE WITNESS: Definitely not.

Q Mr. McGuire, did you believe Moss when he denied that Louis Ostrer had told him anything about knowing that there was a manipulation of the stock?

A No. I asked Mr. Moss, if memory serves me correctly, who on earth he would buy 2000 shares of Belmont Franchising stock, and to the best of my recollection he told me that he did it because Ostrer had convinced him that it was a good investment.

THE COURT: You mean he bought it for his own account?

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THE WITNESS: I don't recall what the mechanics of the transactions were, but Mr. Moss put up the money. It was obviously preposterous that anybody would buy this stock as a good investment, so I didn't believe Mr. Moss.

Q Sir, after that interview did you reach a conclusion about whether or not you would use Mr. Moss as a witness?

A Yes.

Q What was that conclusion?

A My conclusion was that he would do me no good under any circumstances that I could foresee.

Q After November 21, 1972, did you reinterview Moss at any time?

A No.

Q How many witnesses, approximately, did you call at the Ostrer trial?

A A dozen more or less. I think probably a few more.

Q Sir, if a witness was relating some factual circumstances at that trial that were somewhat remote in time was it your practice to reinterview the witness at least once?

A Oh, yes.

Q Sir, were there any other persons such as Moss who had paid Louis Ostrer for stock and then entered into an agreement where Louis Ostrer would hold them harmless against any loss in return for a 50 per cent profit?

A Yes, there was at least one we knew of, and there were several -- and we suspected the possibility that there were at least several others.

Q Do you recollect that witness' name?

A Yes. His name was Lee Evans.

Q Sir, did you call him as a witness?

A No .

Q Did you keep him under subpoena during the trial?

A I believe so.

Q What was your purpose in keeping witnesses under subpoena while you did not in fact intend to call them unless your trial strategy changed?

A Well, there was a very important surprise witness at this trial. His name was Michael Hellerman, and he was one of the architects of the stock manipulation.

THE COURT: That's a surprise? Isn't it always the worst fellow in the scheme that testifies for the government?

THE WITNESS: Hellerman had had the opportunity,

shall we say, to testify at a number of previous government trials, and had not done so, and it was a considerable surprise, I believe, to have him appear on the stand to testify against his former partner John Dioguardia and against Mr. Ostrer.

Q Did you take precautions to make sure it would be a surprise?

A I sure did.

Q What did you do, sir?

A Well --

THE COURT: Does it really matter for the purposes of this hearing?

MR. PEDOWITZ: I will skip that.

A I took extreme precautions, let's put it that way.

Q Mr. Evans was not called as a witness, is that correct?

A He was not.

Q Mr. McGuire, did you have in your possession at the time of the trial copies of the agreements which Louis Ostrer had with Moss and with Evans?

A Yes, there were some written agreements.

Q They were marked as exhibits?

A They were premarked as exhibits before the

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trial ever started.

Q Were they made available to the defense?

A Certainly.

Q They had an opportunity to look at all the exhibits?

A Yes.

Q And those agreements?

A Yes. And some checks besides that related to them.

Q Did they in fact look at the particular documents?

A I really don't know, but I am sure that they had the opportunity to do so, and I believe they did look at them.

Q Mr. McGuire, did the defense call either Mr. Moss or Mr. Evans as a witness?

A No.

MR. DERSHOWITZ: The record will reflect that.

THE COURT: It is all in the record certainly.

Q Did the defense ever ask you or the Court to call these particular individuals as witnesses? And I should rephrase that. Did the defense ever request that the Court call either Evans or Moss as a witness?

MR. DERSHOWITZ: Objection. That is in the

record as well, your Honor.

THE COURT: I don't know if it is in the record or not. I will let him answer. I assume it is negative.

A No, that never happened.

Q Did the defense ever ask you to stipulate that Evans or Moss and Ostrer had entered into these types of hold harmless agreements without calling either of the two men as witnesses?

A Not that I recall.

Q Sir, during the meeting with Mr. Fine on December 22, 1972 --

A You tell me that's the date, sir. I don't have any independent recollection that it is.

Q I'm sorry. Will you accept my representation that that is in fact the date?

A Sure. It was about that time.

Q Did Mr. Fine tell you how he had gotten this information about a possible obstruction of justice?

A Definitely not.

Q Did he play any tapes for you?

A Oh, my goodness, no.

Q Did he advise you that he had recorded conversations of Louis Ostrer?

A Absolutely not.

Q Sir, did you suspect at the time that you had this conference with Fine that this information was obtained from a wiretap?

A The thought never crossed my mind.

Q Did you suspect that it might come from a bug?

A No. If I suspected anything, I suspected that the DA's office had an informant. But I didn't give the matter much thought, I'll tell you that for sure.

Q Sir, I now show you a document which has been marked as Government Exhibit G for identification.

I ask you, sir, if you can identify that document (handing to witness).

A Yes.

Q What is that, sir?

A That is a copy of some pretrial motion papers that Mr. Edelbaum, Ostrer's trial counsel, prepared and served. They have my handwriting on them, which is to the effect they were dated 8-31-71.

Q Referring to page 12 of that particular document, sir, paragraph B, please read that to the Court.

THE COURT: Is it necessary?

MR. PEDOWITZ: Yes. There is a claim there was a Brady violation in that Mr. McGuire did not turn over

certain information to the defense in this particular case, and we would like to dispose of that now.

Q Could you read paragraph B?

A Yes. This is a request for production of documents, and paragraph B reads: "Any and all purported confessions, admissions, or statements made by the defendant Ostrer which are in the possession, custody or control of the government, the existence of which is known or by the exercise of due diligence may become known to the U. S. Attorney, whether such confessions, admissions or statements were recorded stenographically or reduced in any form of writing by the person taking or overhearing such statements, or recorded by means of any mechanical or electrical device."

Q Sir, were the wiretap tapes or the plant logs, to your knowledge, in the possession of the federal government -- the possession, custody or control of the federal government -- in December or January -- December 1972 or January 1973?

A To my certain knowledge they were not in the possession or control of the United States Attorney's Office because had they been I would have known of it, and I don't believe that they were in the possesion of any other agency of the government, either.

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Q By the government, you refer to the federal government?

A Yes.

Q And is that your understanding of what that paragraph requested, information from the federal government as opposed to the state government?

A The government is capitalized in here, and that's what I normally understood to mean by the government.

Q Sir, referring to Paragraph F on page 13 of that particular document, would you read that, please?

A Again, it is a request for the production of material in the possession of the United States.

It says:

"F. Copies of all transcriptions, tapes and recordings which may have been made in the course of the investigation of this matter by the United States Attorney or any other agency of the United States Government, whether in the form of wiretap, bug, or other eavesdropping or listening device, and whether made on the defendant's telephone, home, voice, or otherwise."

Q To your knowledge, were the Ostrer taps authorized or made pursuant to an investigation by any agency of the federal government?

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A No. And I didn't know there was such a thing as an Ostrer tap.

Q Sir, after this trial was over in April of 1973, did you again meet with John Fine?

A Yes.

Q Did you take notes at that meeting?

A. I believe I did.

Q I show you, sir, a document which has been marked as Government's Exhibit H for identification, and I ask you, sir, can you identify that document?

A Those are my notes and my handwriting, and I believe they were made on April 18, 1973, which is the date they bear.

MR. DERSHOWITZ: Can we see those, please?

THE COURT: Yes.

MR. PEDOWITZ: Can I ask a few questions, and then I will offer them, and Mr. Dershowitz can examine them?

THE COURT: Why don't you show them to him? I don't know if I ought to take them. Maybe I need an offer of proof.

MR. PEDOWITZ: Yes, your Honor. They reflect in detail the fact that at this particular meeting Mr. McGuire was told about that fact that there was a tap and details about the Ostrer and November conversations. This, we believe --

THE COURT: Didn't Mr. Fine already testify to this?

MR. PEDOWITZ: Yes, your Honor.

THE COURT: Does anyone doubt the credibility of Mr. Fine on that score?

MR. PEDOWITZ: I don't, your Honor.

THE COURT: Then why are you bothering me with this? I didn't think Mr. Dershowitz questions that that occurred.

MR. DERSHOWITZ: We certainly agree that in April this full disclosure occurred, but we would like to see those notes.

MR. PEDOWITZ: My offer is this:

This is a detailed account of what happened when Mr. Ostrer and Mr. November met. We think this supports an inference that Mr. McGuire could not have learned of this information in December of 1972, because otherwise it would have been unnevessary to prepare these detailed notes in April of 1973.

THE COURT: Show them to Mr. Dershowitz.

(Pause.)

Q Was it at this meeting, sir, that you first learned that the information received in relation to November and Ostrer planning an obstruction with respect to Aubrey Moss was in fact the result of a wire tap or a bug?

A Well, it was the first time, Mr. Pedowitz, that I learned that there had been such a thing as a wire tap or bug. Johnny Fine attempted to characterize this as an obstruction of justice, and the purpose of the meeting was to get out office to undertake an investigation of that. The

characterization side that's what the meeting was about.

Q Sir, did you pursue the obstruction of justice case in the United States Attorney's office?

A No, sir.

Q Why not, sir?

A Well, I discussed it with my colleagues and my superiors and we came to a conclusion. First, that the principal target of any such investigation would be Mr. Ostrer who had just been sentenced to a substantial term in jail anyhow.

Thus, it did not seem a very wise allocation of prosecutorial resources to go after him for what would undoubtedly be considered a rather penny-ante operation in comparison with the Belmont Securities maniopulation.

Second, there were obvious problems of proof in attempting to show an obstruction of justice in connection with these activities. Not only would Mr. Moss probably have had to testify for it, butthe lady in question probably also would have and it seemed a very unappetizing case from a prosecutorial standpoint.

I am sure there were other reasons as well, but --

THE COURT: It was only an attempt, in any event, isn't that so?

THE WITNESS: Yes.

THE COURT: At the most.

THE WITNESS: At the most.

MR. PEDOWITZ: Your Honor, Section 1503 defines an endeavor to obstruct justice which is similar to an intent.

THE COURT: I understand.

THE WITNESS: But it is clear, your Honor, that no obstruction of justice occurred, or at least we thought we couldn't prove one.

Q Mr. McGuire, you were previously shown Movant's Exhibit 12 for identification, a subpoena for Aubrey Moss dated November 30, 1972.

A Yes, sir.

Q . Sir, did you issue that subpoena with the intent of calling Moss as a witness?

A I issued a whole raft of subpoenaes at approximately the same time and to the best of my recollection I issued subpoenaes to everybody who could possibly be considered a witness in this case. I did not wish to give away my trial strategy. I did not, as I have previously testified, have any intention of calling Moss as a witness at the trial, but I wanted to keep the defense guessing.

Q Now, sir, I show you Government's Exhibit X for identification.

A Yes.

Q Now, sir, does that reflect the fact that Mr. Goldman sometime in about December 27, 1972 had recontracted Mr. Moss?

A Yes.

Q Sir, had you had a conversation with Mr. Fine of the DA's office in December of 1972 at which Mr. Fine expressed concern that Moss be kept under subpoena so that there be no indication that the investigation which was being conducted of Ostrer had somehow been exposed?

A Yes. I think I did have such a conversation, although I must say I don't recall it very clearly.

Q Sir, is it speculation on your part as to whether or not you might have instructed Mr. Goldman to contact Mr. Moss once again to make sure that he was under subpoena so that you would comply with the request of the District Attorney's office?

A No. I am sure I did that.

Q You are sure you did that?

A I am sure I contacted Mike Goldman or instructed Mike Goldman to contact Mr. Moss and I am sure that the conversation with assistant DA Fine had something to do

with that.

MR. PEDOWITZ: No further questions, your Honor.

THE COURT: Anything else from this witness?

MR. DERSHOWITZ: Yes, we do, your Honor.

REDIRECT EXAMINATION

BY MR. DERSHOWITZ:

Q Were you told at the meeting in April at which you took notes that Susan Gold felt that Moss was out to get Ostrer?

A If that's what my notes say, that's what I was told, Mr. Dershowitz, but I don't have a very good unrefreshed recollection of that meeting.

Q Now, were you also told that "The only agreement between them seems to be that Edelbaum would not offer the affidavit for cross examination purposes."

If that's what my notes reflect -- yes, I do recall some conversation with Fine and with other people reflecting on Maurie Edelbaum's trial strategy.

Q In other words, the obstruction of justice that was allegedly going to take place --

MR. PEDOWTIZ: Objection, your Honor. This is calling for certainly a conclusion of the witness as to what the nature of the obstruction of justice was.

THE COURT: I don't know that it is. I have not heard the entire question yet.

Q Is it true that you were told that the obstruction of justice allegedly to take place was going to be that Mr. Edelbaum, who was Mr. Ostrer's trial attorney, would be handed an affidavit which contained alleged information about Mr. Moss' relationship with Gold so that Edelbaum could use it to cross examine Moss?

THE COURT: This is what he was told after the trial?

MR. DERSHOWITZ: After the trial.

MR. PEDOWITZ: Objection.

THE COURT: You see, you opened the door, Mr. Pedowitz, bringing this exhibit in, which you are drawing a very thin inference from. Overruled.

A I think I was told something to that effect, although I can't tell you right now how much of the ntoes you are holding in my handwriting represent my mental processes at the time and how much represents what I was told.

Q You have no better source of refreshing your recollection than these notes?

A No, I don't.

Q And these were your contemporaneous notes made

at the time?

A Yes.

Q Looking at these notes, does it refresh your recollection as to whether you took similar notes at your meeting in December?

A No, it does not. My best recollection remains that I did not. My best recollection of the interview with Moss is that I probably wrote his name on the top of a yellow piece of paper when he came into my office and when he told me nothing of interest I threw it away.

Q I'm sorry, I meant to ask you about the meeting between yourself and Mr. Fine, as to whether this series of notes which you took of another meeting between yourself and Mr. Fine refreshes your recollection as to whether you took a set of similar notes in the December meeting with yourself and Mr. Fine.

A I have seen recently another piece of paper on which Mr. Fine's name and the name of another assistant DA appears. I believe that is the substance of my notes with Mr. Fine at that time.

Q Do you have that note available?

MR. PEDOWITZ: Your Honor, I may have that not available, but I thought it of so little consequence --

THE COURT: You are not supposed to think.

The door has been opened to this line of inquiry and counsel may pursue it Produce the note.

MR. DERSHOWITZ: While he is doing that may I ask a further question?

THE COURT: By all means do.

Q When you found out in April that the source of your information had been a wiretap and that the wiretap involved the conversation between Mr. Ostrer and Mr. November, did you at that time in April disclose that to Mr. Louis Ostrer who then had an appeal pending before the Second Circuit?

A No, I didn't make any such statement to Mr. Ostrer or to his counsel.

Q Did you ever disclose to Mr. Ostrer or his counsel while you were in the assistant United States attorney position that there had been a wiretap of conversation between himself and an attorney and that you had been aware of that in April and that you had been aware of some information that derived from it in December?

A Well, the short answer to your question, sir, is no.

Q I am happy with the short answer.

A I am sure of that.

THE COURT: Gentlemen, don't let's have these

exchanges. It is a compound question, but I guess it can all be answered no.

Q Did you re-interview any of the witnesses in this case between December 22nd and the date of the trial in January?

A I am certain I did very little else.

Q Would it be fair to say that the bulk of the re-interviewing or much of the re-interviewing occurred between December 22nd and the trial itself?

A No.

Q When did the bulk of the re-examination occur?

THE COURT: I don't know thatthat matters. Let's stick with Moss.

MR. PEDOWITZ: Your Honor, I now have the document.

THE COURT: All right, mark it for identification.

(Government's Exhibit Y marked for identification)

Q Did you recontact Mr. Evans about testifying at the trial?

THE COURT: I don't know that this matters. I will have to take an offer of proof before I got this far afield. Suppose he did. What difference does it

make?

MR. DERSHOWITZ: To indicate what he did with Mr. Moss was in any way unique.

MR. PEDOWITZ: I will object to it, your Honor.

THE COURT: I will sustain it. I couldn't draw an inference from whether or not he interviewed Evans that what he did with Moss was unique.

MR. PEDOWITZ: I supplied Mr. Dershowitz with Government's Exhibit Y which is the note Mr. Pedowitz referred to on the stand.

THE COURT: All right.

Q I take it these are your notes of the meeting between yourself and John Fine on December 22nd?

A It is undated, Mr. Dershowitz, but I believe that to be the case. Some of the writing on there is mine and some of it is Myer Goldman's.

Q Do you recall whether the writing on top which deals with Room 674, was that the room to which you were to go for your meeting with Mr. Fine?

A That's the room in the District Attorney's office where Mr. Mollo told me to go.

Q Does it say next to Mr. Fine's name, "Info for cross"?

A Yes, that's what it says.

Q That's my question.

A Yes.

THE COURT: I would like to finish up. Let's go forward.

MR. DERSHOWITZ: So would we, your Honor.

Just one moment and I think we will be finished with this witness.

(Pause)

MR. DERSHOWITZ: No further questions, your Honor.

MR. PEDOWITZ: One question, your Honor.

RECROSS EXAMINATION

BY MR. PEDOWITZ:

Q Sir, to the best of your recollection, what does this reference, "Info for cross" refer to?

A It refers to the fact that I was extremely interested in getting from John Fine all the information I could for the cross examination of Louis Ostrer and he supplied me with some. Most of my conversation with Fine when I was in his office in December related to his ongoing investigation of Ostrer.

I was interested in prying as much material as I could out of him about that investigation so that if

Ostrer took the stand at his own trial I could cross examine him.

I was quite unsuccessful in obtaining anything from Mr. Fine on that score, but as the bottom line of these notes indicates, I did obtain a certified copy of Ostrer's judgment of conviction in 1969 and I did obtain from Mr. Fine a transcript of his guilty plea in 1969 in the state court.

MR. PEDOWITZ: No further questions.

THE COURT: Did you really think that you could cross examine him like that? This was before the new rules even, wasn't it?

Did you think you could cross examine him as to other matters that the DA had?

THE WITNESS: Did I think I could cross examine him as to a conviction?

THE COURT: I am not talking about the conviction. I am talking about the then ongoing investigations.

THE WITNESS: Your Honor, what I obtained from the DA's office was information relating to a conviction of Mr. Ostrer in 1969.

If Mr. Ostrer had also committed other crimes or bad acts in the meantime I wanted to know about it, sir.

THE COURT: Did you ask?

THE WITNESS: No, sir. I wanted to cross examine him to the extent I was able to.

THE COURT: In this circuit in those days that would have been about zero, wouldn't it?

MR. PEDOWITZ: I ask the Court to take judicial notice of the fact that similar bad acts can be inquired into.

THE COURT: For that you have to give notice

MR. PEDOWITZ: That was the Baum case which occurred sometime later in 1974.

THE COURT: Let's go forward. Anything else for this witness?

MR. PEDOWITZ: No.

MR. DERSHOWITZ: No further questions for this witness.

THE COURT: All right, sir, you are excused.

(Witness excused)

MR. DERSHOWITZ: I would like to call Mr. Julius November as our next witness.

THE COURT: No, I am going to take that policeman and get him back to work. He has been here all day.

MR. DERSHOWITZ: We have been ready to take him all day.

THE COURT: All right.

MR. DERSHOWITZ: Would it be possible for us to talk about a possible schedule for when we could play the tapes to you and talk about some other matters?

THE COURT: I have to finish the live witnesses. I thought I would today but I see I am not going to finish them today because I have this witness and I have Mr. November and I am limited as to how late I can sit. It is about twenty after five right now.

MR. DERSHOWITZ: We are prepared to be very quick with both witnesses. I have one question for this witness.

THE COURT: I will take this witness and break for the day.

C H A R L E S G A R A B E D I A N , called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DERSHOWITZ:

Q Did there come a time inthe late part of 1972 to the early part of 1973 when you had a discussion with Mr. Fine about a tap on Louis Ostrer's telephone involving a witness named Aubrey Moss?

A Yes.

Q Can you tell us the time and place of such a

meeting and discussion?

A I couldn't tell you an exact time. The place would have been in Mr. Fine's office at 155 Leonard Street on the Seventh Floor.

Q What was your employment at the time?

A Pardon me, sir?

Q You were at the time working as a police officer attached to Mr. Fine's office?

A Sergeant supervising the investigation.

Q Can you tell us what Mr. Fine told you?

A Well, I am paraphrasing the conversation because I don't recall exactly. Actually more accurately it was what we told Mr. Fine and that was --

Q Excuse me, who is we?

A When I saw we I am referring to the police officers.

Q Which police officers were involved in that conversation?

A If my memory serves me correctly Walter Finley would have been one. There possibly was a second officer.

Q And yourself?

A Well, you have to appreciate they were sitting at the plant monitoring the calls. I was at the office. They made me aware of this conversation and --

Q What conversation are you referring to now?

A The one regarding Aubrey Moss.

Q Can you tell us what they told you?

MR. PEDOWITZ: Objection, your Honor. Irrelevant.

THE COURT: I don't think it is irrelevant, but very quickly, please.

A I am just going to paraphrase it because if my memory serves me correctly they told me that they monitored a conversation and it had to do with I believe it was either a juror or a witness named Aubrey Moss who had something to do with Mr. Ostrer's trial or it was a grand juror that had to do with Mr. Ostrer's matter in federal court.

I told him to bring it to the attention of Mr. Fine.

Q Did you participate in any subsequent meeting with Mr. Fine dealing with this matter?

A I probably did, yes.

Q Can you tell us what you told Mr. Fine and what Mr. Fine told you?

THE COURT: First fix the time.

MR. DERSHOWITZ: I asked him. He said he didn't recall the time.

THE COURT: Well, was it before January 26, 1973?

THE WITNESS: I would say yes, it was.

THE COURT: All right, tell us what happened.

A Well, there was a discussion as to what we were going to do with this information.

Q What was said by whom?

A I don't recall exactly, but the time came when both of us were discussing the matter and we discussed just what I had said in that this conversation was monitored and there was some discussion as to whether ot not it should be brought to the attention of the federal authorities.

Q Did Mr. Fine express some concern about bringing it to the attention of the federal authorities because it was on wiretap?

A Yes, he did.

Q Did he express any concern about possible constitutional problems that might result from giving the federal government material from state wiretap information?

A Yes. He didn't explain it as such, but he did mention that there would be legal problems involved. He anticipated that there were probably legal problems here.

Q Did he indicate also that there were legal problems because of the fact that there was conversation

between a lawyer and a client on the tape?

A No, sir.

Q Did you understand that there was conversation between a lawyer as a client?

A Are you referring to Mr. Ostrer and Mr. November?

Q Yes.

A I was aware of those conversations, yes.

Q When you told Mr. Fine about those conversations, did you describe them as conversations between Ostrer and his lawyer?

A There were more than one. There were a number of them as I recall. You see, what we would do is I would receive the plant reports and we would receive two copies. I would get one and I would send the other to Mr. Fine and when the time came that Mr. Fine chose to discuss something with me he would call me up and he could come up to my office or I would discuss it.

Q During any of those conversations did you relate to Mr. Fine that there was some conversations between Mr. November who was the lawyer and Mr. Ostrer?

A Well, he would have been aware of this almost simultaneously at the time that Iwas because he was reading the report at approximately the same time.

Q Was it finally decided in your presence that

the resolution would be to release the information to the federal government but not to tell them that there were any wiretaps involved?

A To the best of my recollection, the way that it was decided was that we would make the federal authorities aware of this without giving up the source of our information which would be the wiretaps, of course.

Q And one of the reasons for that that was expressed to you was so as to not endanger the federal prosecution because of possible constitutional problems?

A Once again, it was just pointed out to me that there were legal technicalities involved in the matter.

Q That might endanger the federal prosecution?

A Yes.

THE COURT: Who pointed this out to you?

THE WITNESS: Mr. Fine.

MR. DERSHOWITZ: No further questions of this witness, your Honor.

CROSS EXAMINATION

BY MR. PEDOWITZ:

Q Sir, is it fair to say that your recollection of the conversations that occurred in the late 1972 period are hazy?

A That's true.

Q Sir, while the bugs and taps were installed on Louis Ostrer's home and office, did you at any time communicate any information obtained from those bugs and wiretaps to any federal officials, officers or employees?

A Never.

MR. PEDOWITZ: I have no further questions, your Honor.

THE COURT: Anything else?

MR. DERSHOWITZ: I have no further questions, your Honor.

THE COURT: All right, you are excused.

(Witness excused)

THE COURT: All right, at this time, I will continue this hearing until 2:00 p.m. tomorrow. I have to start a jury trial in the morning which has been scheduled and which I cannot change.

MR. DERSHOWITZ: Your Honor, the only day I teach classes in the entire week is Tuesday.

THE COURT: Mr. Silverglate can conduct it. I have to get this matter finished, and I must say to you, at least part of the problem is laid right at your door by this unduly lengthy hearing we have had today.

Part of the problem I charge against Mr. Pedowitz, but we have had what amounts to windmilling questions here which have gone on and on and many of them far off the mark. This is a lengthy -- it is an old matter. I have had it for a long time. I am bound and determined to conclude it.

I would much prefer to proceed with my jury trial tomorrow and take the full day, but you will be here at 2:00 o'clock or Mr. Silverglate will run the trial.

MR. DERSHOWITZ: May Ihave one request? I apologize for any delays.

THE COURT: Tell your class to come at another time.

MR. DERSHOWITZ: If I could explain as a personal matter, this may sound strange, but tomorrow is a class that I teach together with Mr. Silverglate, number one.

Number two, as I explained last week I had my own divorce and had to cancel Tuesday class. Tuesday is the only day in which I teach class. I can appear any single day, Wednesday, Thursday, Friday, any day other than tomorrow.

THE COURT: I never heard such tales of woe.

I will have to go along with you.

MR. DERSHOWITZ: Thank you, your Honor. I appreciate it.

THE COURT: Wednesday is all right for you?

MR. DERSHOWITZ: Yes.

THE COURT: 2:00 o'clock on Wednesday the 3rd of March.

All right, Mr. Ostrer, you are continued on bail until March 3rd at 2:00 p.m. You are to return here. Do you understa nd your obligations?

THE DEFENDANT: Yes, sir. Yes, your Honor.

THE COURT: All right, the matter is continued for all purposes until then.

MR. DERSHOWITZ: Thank you very much, your Honor for your understanding.

THE COURT: I understand there are difficulties, but I would like you to understand I have difficulties, too.

MR. PEDOWITZ: Good night, your Honor.

THE COURT: Good night, gentlemen.

(Adjourned to 2:00 o'clock p.m., March 3, 1976.)

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UNITED STATES OF AMERICA [304]

vs. 71 Cr. 558

LOUIS OSTRER,

March 3, 1976
2 p.m.

- - -

MR. DERSHOWITZ: May it please the Court, may I make a correction on the record in the case?

THE COURT: What page?

MR. DERSHOWITZ: No, I'm sorry, I don't mean that kind of a correction.

I learned from the government today that they were able to hear fragments of the conversation that we were not able to hear on their tape and we are willing now to accept and stipulate to the fact that that matter does appear on the government's version of the tape and that the tape is therefore complete and we apologize to the Court.

THE COURT: Just to clarify the record and refresh my memory, which matter are we talking about?

MR. PEDOWITZ: This is with respect to Mr. Campriello's testimony. While Mr. Campriello was on the stand, Mr. Dershowitz asked him, making reference to state grand jury testimony, whether it was possible that certain tapes were not in fact turned over to Mr. Ostrer.

rglt [305]

THE COURT: Is it now stated that the grand jury minutes substantially track the tape?

MR. DERSHOWITZ: Yes.

THE COURT: Very well, thank you, gentlemen.

Next witness, please.

MR. PEDOWITZ: Your Honor, there are one or two preliminary matters this afternoon.

First of all, I made reference and Mr. McGuire made reference to a pre-trial motion for discovery by Mr. Ostrer and we would like to offer that full document into evidence.

I assume Mr. Dershowitz has no objection?

MR. DERSHOWITZ: No objection.

THE COURT: Isn't that part of our docket? Isn't that already before the Court?

MR. DERSHOWITZ: And indeed, it is in fact a part of our papers that we submitted in aid of the motion for a new trial.

THE COURT: I will take the position that anything which has been duly docketed and filed under this docket number is available to either of you. Of course, I expect you to call my attention to these papers in your briefs and direct my attention to what you are relying on, but it is not necessary to introduce into evidence something

which is already part of the Court's own records of which I can take judicial notice, even though that position was not heard by me.

MR. PEDOWITZ: In addition, Mr. Dershowitz requested that Mr. Scotti provide his diary entry for December 21, 1972 on the reference that he made to the fact that there was an entry that he had called Mr. Moss of the Eastern District and then had called Mr. Mollo.

I received today in the mail from Mr. Scotti a Xerox copy of that particular page of his diary, and I would offer that into evidence as Government's Exhibit Z.

MR. DERSHOWITZ: No objection.

THE COURT: Received in evidence.

(Government's Exhibit Z was received in evidence.)

MR. PEDOWITZ: Your Honor, in addition, I had mentioned to Mr. Dershowitz that there was a brief matter which I wished to cover with Mr. McGuire and rather than have him come back and be called as a government witness, Mr. Dershowitz was kind enough to consent to have Mr. McGuire recalled just for a very brief period this afternoon.

THE COURT: All right.

H A R O L D Mc G U I R E, resumed.

MR. PEDOWITZ: Your Honor, the witness will be considered as being still sworn.

THE COURT: Yes, the witness is reminded he is still under oath in this proceeding.

FURTHER DIRECT EXAMINATION

BY MR. PEDOWITZ:

Q Mr. McGuire, to the extent that you recollect being told that a Mr. Lynch might be associated with Mr. Ostrer in this prosecution, to what extent, if any, did that effect the way you prepared for and conducted the trial of Mr. Ostrer in late 1972 and early 1973?

A It didn't affect it at all.

Q Sir, would you care to explain?

A Well, it was a reasonably common thing in the cases that I handled at the U.S. Attorney's office at that time for defendants and their lawyers to engage private investigators of one sort or another and the fact that Mr. Ostrer had a private investigator working on the case was of really no moment to me at all.

I knew that was a perfectly common practice and except for the fact that I met this man who I guess was named Lynch during the course of the trial and had some very casual conversation with him, it didn't affect my conduct

of the proceedings at all.

Q Mr. McGuire, you made reference in your testimony to a meeting with Mr. Fine of the District Attorney's office in April of 1973. I believe the exact date was April 18th?

A Yes.

Q Now, sir, at that time did you know that the wiretaps and bugs in question were unlawful?

A No. Indeed --

THE COURT: What time is this now?

MR. PEDOWITZ: This is April of 1973, your Honor.

A Indeed, the first thing I asked Mr. Fine when I heard that there was such a thing as a wiretap was under what circumstances the taps had been obtained and to the best of my recollection, he hasned me that the taps had been obtained by court process and that there was a continuing investigation.

MR. PEDOWITZ: Your Honor, I have no further questions of this witness, but I would ask your Honor to take notice of the fact and indeed this is in the record, that it was not until some time in 1975 that the District Attorney's office conceded that the taps were in fact unlawful as a result of an earlier decision of a Supreme

Court Justice of the State to the effect that earlier wiretaps which led to this particular wiretap, were indeed not based on probable cause.

THE COURT: All right.

FURTHER CROSS EXAMINATION

BY MR. DERSHOWITZ:

Q Mr. McGuire, did you know previously being told by Mr. Fine that Jim Lynch was Mr. Ostrer's investigator in this federal case?

A My recollection on this subject, Mr. Dershowitz, is very, very dim. Until the name Jim Lynch and the fact of some former FBI connection was brought to my attention in preparation for this hearing, I didn't recollect the incident or the man at all. I have tried to search my recollection and I believe that I may have been told by John Fine or by one of the policemen in his office when I met with him in December of '72, that there was a person named Lynch who was either then or a former FBI agent who was working for Ostrer.

I have some dim recollection of having contacted the New York office of the FBI to see if there was at present an agent named Lynch on their payroll because if an agent named Lynch was currently working for the FBI and was also moonlighting for Mr. Ostrer, that would have been a serious

matter.

Q Can you tell the Court what the results of your investigation into this matter was?

A Well, to the extent I recall it at all, I recall that the FBI said no, there wasn't any agent by that name, and I let it drop.

Q You don't know, though, whether it was Mr. Fine or one of the policemen who told you about Mr. Lynch?

A I really don't recollect the incident at all.

Mr. Lynch was of very little importance to me then or afterwards.

Q But it is your testimony that both the policeman and Mr. Fine did communicate to you at that meeting --

MR. PEDOWITZ: Objection, your Honor. That certainly misstates the record.

A No, that's not right.

THE COURT: The witness can answer.

A That is not my testimony. I cannot recall whether the policemen said anything of substance at all during the meeting. I know Mr. Fine did and I recall that there were one or more policemen there, but if you produce them for me now, in this courtroom, if you produced a number of policemen, I couldn't begin to tell you which one was there.

Q But it is possible that one or another of the policemen did speak to you at that meeting?

A I can't mathematically rule it out, because I don't remember the incident.

Q Did you learn at the April 18th meeting at which you say you first learned about the wiretaps, did you learn at that time that the wiretap did include conversations between Mr. Ostrer and an attorney named Mr. Julius November?

A In order to give you a fair answer, I think I would haveto look at my notes of that meeting. May I?

Q By all means.

Do these notes refresh your recollection as to whether you were told about the conversation?

MR. PEDOWITZ: Your Honor, for the record that is Government's Exhibit H for identification.

THE COURT: Thank you.

A Yes. My notes say that there was a tape recorded conversation between Ostrer and November resulting from a bug in Ostrer's office which contained urgings by November to inform Moss that he was on the spot and some diffidence on the part of Ostrer.

I don't recall anything further than that.

MR. DERSHOWITZ: No further questions of this

witness, your Honor.

BY THE COURT:

Q What is your present occupation?

A I'm an attorney.

Q What are you doing? Do you practice somewhere?

A Yes. I am a member of a law firm called Gilbert, Segal & Young and I am engaged in litigation practice.

Q In this city?

A Yes, sir.

Q On the evening of March 1st after you left the court, did you attend a speech given by the Honorable R. Tyler at the Association of the Bar?

A Yes, sir.

Q During the course of that speech did you pose a question to former Judge Tyler from the floor?

A Yes, I did.

Q Do you have any bias or attitude concerning this litigation?

A Well, I certainly have an attitude, sir, and my attitude, if you would like me explore that --

Q I would like to ascertain whether you have any bias or attitude concerning this particular hearing.

A I would not say that I have a bias, your Honor,

and I certainly have been doing my utmost to respond completely and truthfully to the questions.

It would not be fair of me, however, to say that I did not think on the basis of my prior association with this case, that Mr. Ostrer was guilty of the crimes with which he was charged and of which he was convicted at trial and I do think that the post-trial proceedings have been protracted to a much greater extent than I would have thought desirable.

I don't intend by saying that, your Honor, to impute blame on anybody, but I do think that it is unfortunate that criminal proceedings involving facts which took place in 1970 still have not been resolved by the middle of 1976.

THE COURT: Anything else from this witness?

MR. PEDOWITZ: I have nothing further, your Honor.

THE COURT: Perhaps just to complete the last inquiry, would you state to us whether you stated anything to former Judge Tyler of and concerning this case on that occasion this weekend, and if so, what did you say?

THE WITNESS: Judge Tyler was giving a lecture at the Bar Association. He is of course, now a Deputy Attorney General of the United States. He was commenting

on some of the provisions of the proposed Federal Criminal Code.

I asked him in the question and answer period at the end of that speech, in substance, whether in his judgment the passage by the Congress of a new complete Federal Criminal Code would tend to delay proceedings in criminal cases and I pointed to the fact that I had recently been privy to an instance which I thought was a horrible example of protracted proceedings in criminal cases.

By that, I meant, although I didnot refer to it in any identifiable way, this case.

THE COURT: All right.

Anything else from this witness?

MR. PEDOWITZ: Nothing, your Honor.

THE COURT: You are excused, sir.

(Witness excused.)

MR. DERSHOWITZ: We would like to call as our next witness, Maurice Edelbaum.

M A U R I C E E D E L B A U M, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DERSHOWITZ:

Q Mr. Edelbaum, will you tell the Court your

current occupation.

A I'm a lawyer.

Q When were you admitted to the Bar?

A I was admitted April 2, 1930.

Q For how long have you been practicing law, approximately?

A During all of that time.

Q What is your specialty?

A I specialized in the trial of criminal cases over the years and as a matter of fact I clerked for a criminal lawyer back in 1927 before I graduated from Fordham University Law School in June of 1928.

THE COURT: Who did you clerk for?

THE WITNESS: Edward J. Reilly, your Honor, who defended Bruno Richard Hauptmann.

Q Can you give us some estimate of the number of criminal cases that you tried during that time?

A Hundreds.

Q Did there come a time when you were retained by one Louis Ostrer to represent him in a federal court case?

A Yes, sir.

Q And did there come a time when Mr. Ostrer spoke to you about a prospective government witness in that case named Aubrey Moss?

A Yes.

Q Can you tell the Court --

THE COURT: Just a moment, now. Before we get too deep in this, I want to point out to you that it is clera on the record before me as well as Mr. Edelbaum's testimony that he has an attorney-client relationship with Mr. Ostrer and I would have to call attention of all of you to the fact that any areas as to which that attorney-client privilege is opened by yourself in questioning Mr. Edelbaum will be open on cross examination as to the particular conversations or particular transactions.

Inquiry as to one event or one transaction or a conversation would not ordinarily constitute a blanket waiver of a privilege, but I want to make absolutely certain that Mr. Ostrer knows about this, that these questions are being asked with his knowledge and consent.

THE WITNESS: I was going to call that to the attention of the professor, your Honor. I thank you.

THE COURT: I knew you were.

THE WITNESS: I would suggest Mr. Ostrer place on the record before I answer anything, a complete waiver of the attorney-client relationship, your Honor, if he wants me to answer any questions.

THE COURT: If it is a complete waiver, you

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see, the scope of cross examination is open.

MR. DERSHOWITZ: The record should reflect that we are with full knowledge of your Honor's ruling.

THE COURT: Mr. Ostrer, step up next to Professor Dershowitz.

The Court is satisfied that the present witness acted in a relationship of attorney and client with you. You are instructed that you have an absolute privilege under the law which requires that your attorney or former attorney cannot testify as to any conversations or transactions or matters had with you within the scope of confidentiality of the attorney=client relationship.

That is to say, contacts where there were no strangers or unrelated persons present. I hope I made that clear. He may not do it without your knowledgable consent.

Furthermore, if you do consent that he testify as to such discussions or conversations or transactions in derogation of your attorney-client privilege, you will not be able to assert nor will Mr. Edelbaum, the attorney-client privilege as to cross examination directed to the same transactions or conversations or incidents or whatever they are which are elicited on the direct examination.

Now, do you personally understand what I'm talking about here?

THE DEFENDANT: Yes, your Honor, I do.

THE COURT: Have you discussed it with these attorneys?

THE DEFENDANT: Yes, your Honor, I did.

THE COURT: I think I asked you this once before, but what is the extent of your education?

THE DEFENDANT: I am a high school graduate.

THE COURT: And you have been in business, haven't you, for yourself, over these years?

THE DEFENDANT: Since I got out of the service of the United States Army in 1946 I have been self-employed.

THE COURT: How old are you, sir?

THE DEFENDANT: 53.

THE COURT: Is it your intention that there be a waiver of your attorney-client privilege with Mr. Edelbaum?

MR. DERSHOWITZ: May I confer with him on that matter, your Honor?

THE COURT: I really think you ought to both confer.

MR. DERSHOWITZ: Your Honor, we have both conferred.

THE COURT: Mr. Edelbaum knows what he was told better than you do.

MR. DERSHOWITZ: We have conferred. It is our position that to the extent we ask questions we fully waive the privilge in respect to the examination, the scope of the examination. I am reluctant for no particular reason, but because there is no necessity we would rather not at this point make a full and complete waiver of the entire lawyer-client privilege, only because we see no reason for doing so

THE COURT: I am reluctant to have an attorney testify to anything that he did with his client. I would prefer that you give me an offer of proof because maybe the testimony which you purport to elicit here would be either inadmissible, immaterial or irrelevant. You see, I can never be certain that in the narrow concentration on this particular hearing and the zeal to achieve the best possible result, I can never be certain as to whether he really effectuated a knowledgeable waiver or not.

MR. DERSHOWITZ: Your Honor, perhaps if we --

THE COURT: If I were Mr. Edelbaum, I would tell him "Don't you do it," but I don't mean to preempt your judgment, sir.

MR. DERSHOWITZ: We would be happy to make an offer of proof.

THE COURT: Give me an offer of proof and then I will decide.

MR. DERSHOWITZ: Should the offer of proof be made out of the presence of the witness?

THE COURT: Yes, you step out, Mr. Edelbaum.

(Witness temporarily excused.)

MR. DERSHOWITZ: Perhaps the government can stipulate to it, your Honor.

THE COURT: You see, they don't care. They would like to cross examine the witness as far as the court will let them, I'm sure, so why don't you make sure of proof.

MR. DERSHOWITZ: I want to make it clear, however, consistent with your ruling that the offer of proof does not in itself constitute any violation of the privilege.

THE COURT: Of course.

MR. PEDOWITZ: Then I assume there is nothing that is admissible at this point through the offer.

MR. DERSHOWITZ: There is nothing that is admissible through the offer.

THE COURT: He is making an offer. He is telling the Court that if the attorney-client privilege were waived knowingly and intentionally by Mr. Ostrer, that Mr. Edelbaum would testify as follows and then the Court will rule on his offer of proof.

If I rule that I will take the proof then I will hear whether Mr. Ostrer made the waiver of not and if he makes a proper waiver and does so in my opinion knowingly and intentionally and knowing all the risks, then I will let Mr. Edelbaum testify.

MR. PEDOWITZ: That's fine, your Honor. Maybe we can short circuit this.

THE COURT: Yes, I'm waiting for the offer of proof.

MR. PEDOWITZ: If there is nothing in addition than Mr. Edelbaum's affidavit that --

THE COURT: Please.

MR. DERSHOWITZ: That's essentially it.

THE COURT: Hand up the affidavit.

MR. DERSHOWITZ: I prefer to make the offer simply to make the record complete, as to our contemporaneous knowledge of what he would testify to.

Mr. Edelbaum would testify that there came a time when Mr. Ostrer spoke to him and told him about a prospective government witness names Moss and that he told him that Mr. Moss had on several occasions tried to call him, that is, Moss tried to call Ostrer to come to speak to him.

Mr. Ostrer asked Mr. Edelbaum about that and Mr. Edelbaum said "Don't you dare to speak to him. I don't

want you to speak to him under any circumstances."

Mr. Oster said "That was my view. I didn't think I should speak to him under any circumstances either."

Mr. Edelbaum said"If he calls you again tell him to come to speak to me."

At that point Mr. Edelbaum will testify that he interviewed Mr. Moss and that Mr. Moss told him essentially what he knew about the case. He told him that he had had an arrangement with Mr. Ostrer whereby Mr. Moss would be guaranteed against any losses in his investment in the case and Mr. Moss would get fifty percent of the profits of the entire deal and -- would get fifty percent of the profits in the entire deal.

At that point we are going to ask Mr. Edelbaum as to whether he arrived at any conclusion with regard to Mr. Moss and he would testify that he arrived at the conclusion that it would not be in the best interests of his defendant strategically and tactically for him to call Mr. Moss as a witness, because he had learned through Ms. Gold that Mr. Moss had once said he was out to get Louis Ostrer and, therefore, Mr. Edelbaum would not have put Moss on the witness stand because he did not feel he could impeach him with that testimony, but it was clearly an important part of the defense strategy for the government

to call Mr. Moss and for the defense to use Mr. Moss to elicit testimony that there was a contract providing for Mr. Moss to get fifty percent of the profits.

That was critical because Mr. Hellerman, the government's key witness, had already testified or was going to testify that he was to get fifty percent of Mr. Ostrer's profits and that would leave room for arguing to the jury that if Mr. Moss was to get fifty percent of the profits and Mr. Hellerman were to get fifty percent of the profits, where were the profits for Mr. Ostrer?

That would have cast considerable doubt upon the government's main witness' testimony and, therefore, it was the strategy to wait, to lie in waiting for the government to call Mr Moss.

Also, for the defense to be able to very effectively cross examine Mr. Moss because the defense believed that the government had no idea at all about Mr. Moss' previous statements relating to Mr. Ostrer and had no idea about the possible background problems that Mr. Moss may have had and it would have been a great surprise to the government to have had one of their main witnesses both impeached in that way and also elicited from a government witness evidence which could be so favorable to the defense. That is the main thrust of Mr. Edelbaum's testimony.

One further question was that Mr. Edelbaum would testify that he did meet with Mr. Ostrer at Mr. Ostrer's office during the course of the trial while the wiretapping was going on.

And further, that Mr. Edelbaum would testify that he consulted with Mr. Julius November about this case and that to his knowledge, Mr. November had a lawyer-client relationship with him relating to this case. That is the extent of the testimony.

THE COURT: I don't know that I would take that last part because that's only hearsay as to this witness. Mr. November or Mr. Ostrer may be able to testify.

Now, it seems to me that no attorney-client privilege is involved as to conversations between the witness, the defendant and Moss because the presence of Moss in that conversation negates the confidentiality. So I believe I could take that testimony without effecting the privilege.

As far as the operations of Mr. Edelbaum's mind are concerned, I suppose that, too, is not within the scope of the attorney-client privilege and if the testimony is limited to that, I would take it. I see no need for the other testimony to the effect that he talked to Moss, because -- wait a minute, now. Did Moss come to see

Edelbaum voluntarily or how?

MR. DERSHOWITZ: Moss was told according to his testimony that Mr. Ostrer would not see Moss; that if he wanted to see anybody, he would have to make an appointment with Mr. Edelbaum, his attorney.

THE COURT: Mr. Edelbaum can testify to his knowledge that there came a time when Moss called him up and asked for an appointment. I suppose I will take that much.

I will not take attorney-client conversations which are proffered.

MR. DERSHOWITZ: May we ask the government if they would concede to the testimony?

THE COURT: Isn't it irrelevant? The significant problem is that Moss called up Edelbaum and asked for an appointment to see Edelbaum and subsequently did see him.

MR. DERSHOWITZ: Yes.

THE COURT: That's what's essential here. It doesn't matter the least bit that Mr. Ostrer told Mr. Edelbaum that Moss wanted to see him or that Mr. Edelbaum told Mr. Ostrer "Don't you dare." Both would be presumative advice, but I don't think it makes any difference. It is all preliminaries.

MR. DERSHOWITZ: We don't know whether the government's position is going to be that there actually was

an attempted obstruction of justice. It is our position there was no such thing. It was entirely a figment of the government's imagination.

THE COURT: Do you want to reply, Mr. Pedowitz?

MR. PEDOWITZ: I will start with the last point first, your Honor.

I don't believe that it was entirely a figment of anyone's imagination as I think the tapes make entirely clear.

THE COURT: This man had nothing to do with it, did he?

MR. PEDOWITZ: No, sir.

On the other hand, your Honor, certain statements have been made by Mr. Dershowitz about what Mr. Edelbaum would say about trial strategy.

THE COURT: That I would be inclined to take. That does not involve any attorney-client privilege.

MR. PEDOWITZ: Yes, your Honor. If you recall at the last pre-hearing conference that we had that we discussed for a few minutes whether or not we would bifurcate the issues of what was turned over to the government and, secondly, would it have made any difference to the government in any event if this man had taken the stand.

Now, obviously from the position that Mr.

Dershowitz is taking through this witness, Mr. Dershowitz wishes to reach this issue now. I raised it through Mr. McGuire only for the purpose of showing that Mr. McGuire would not have done anything different.

THE COURT: I would be inclined to take it now. I think it is reasonable. We have a busy practitioner, he is here and he is ready to testify. It doesn't come as any real surprise to you. I don't know why I can't take it now.

MR. PEDOWITZ: Your Honor, if that is the way you wish to proceed I have no objection to it, but I most certainly would wish to question Mr. Edelbaum about this supposed strategy since Moss' relationship with this whole transaction was only for 2,000 shares and Mr. Ostrer was acquiring 14,000.

Now, our point is that Mr. Ostrer was borrowing money from one Hickey Lorenzo, a loanshark, and he was going out to his friends to acquire money so that he could put a portion of the float, a portion of the 14,000 shares--in the parlance of manipulation cases -- to bed, so that he would not have to worry about those particular shares.

So he went to his friends and made arrangements for fifty percent splits which would not have given him any profit with respect to those 2,000 shares so that he could

later go out and make a profit with respect to the other shares.

THE COURT: You see, all of that came out at the trial, didn't it?

MR. PEDOWITZ: Most certainly, your Honor.

THE COURT: And it is in the trial minutes and what we are talking about now, I gather, although the time hasn't been fixed, is events happening prior to the empanelling of the jury.

I would permit the witness to testify as to that. Now, I will give you one more chance, Mr. Dershowitz. Do you see any need or basis for the Court going any further into the question of waiver?

MR. DERSHOWITZ: No. I think, your Honor, in light of your Honor's ruling, I think we can probably ask Mr. Edelbaum everything we have to without getting into privileged material.

THE COURT: I would think you could and I would think that anything that took place at the trial is available to the government. Of course, there's no showing as to how much of the evidence that came out at the trial was within the knowledge of Mr. Edelbaum before he commenced the trial.

MR. PEDOWITZ: That's certainly true, your Honor.

MR. DERSHOWITZ: Your Honor, one matter of correction.

The government stated I think just inadvertently that there were 14,000 shares. I don't think that's a representation because it is my understanding that there were only 6,000 shares in addition to Mr. Moss' 2,000 shares for a total of 8. If there is any dispute about that, that is obviously in the trial record, but I am advised, and I cannot represent to the Court from my personal knowledge, but I am advised the figure is 6 in addition, rather than 14.

THE COURT: Fine. Whatever the record shows, you may call it to my attention.

MR. PEDOWITZ: Your Honor, I most certainly stand on my prior representation. Mr. Hellerman's testimony was that Mr. Ostrer committed himself to the purchase of 14,000 shares.

THE COURT: What the record shows, the record shows.

Ask Mr. Edelbaum to return.

MR. PEDOWITZ: I would liketo make it clear that I am not of the same view that you are with respect to whether or not the attorney-client privilege may be involved in this particular witness' testimony. To the extent that

he does go into privileged matter, we would like it clear that Mr. Ostrer has waived the privilege to that extent and also to the extent thatthe government should be permitted to effectively cross examine him.

THE COURT: If there is a meeting attended by Mr. Ostrer, Mr. Edelbaum and Mr. Moss, how can it possibly be asserted that any communication at that meeting was privileged?

MR. PEDOWITZ: Your Honor, my understanding was that Mr. Dershowitz was not claiming that Mr. Ostrer was present in Mr. Edelbaum's office when Mr. Moss was interviewed.

THE COURT: Suppose he were when he was interviewed. It was not an attorney-client information.

MR. PEDOWITZ: Most certainly, but it falls within work product privilege. We have gotten into this and Judge Frankel's opinion in the Turkeltube --

THE COURT: I don't agree with Turkeltube at all.

All right, let's get Mr. Ostrer on the record. I suppose I have to proceed very carefully whenever the possible question of privilege is involved.

Please step forward again.

Do you understand, Mr. Ostrer, that you have the absolute personal right to prevent this witness Edelbaum,

who just left the room, from testifying as to anything that took place in any conversations or transactions which he had with you of the nature of an attorney-client privilege or from disclosing anything that he generated by acting on your retainer which might be called a work product privilege, and that you have a right to confidentiality of those matters which pertain to your effective representation of counsel and furthermore that should you be granted a new trial, there is a definite risk that material might be developed at this hearing from Mr. Edelbaum's testimony which might adversely affect your interests on such a new trial.

Do you understand all those possibilities?

THE DEFENDANT: Yes, your Honor, I do.

THE COURT: And you have discussed them, have you, fully, with your attorneys -- your present attorneys?

THE DEFENDANT: Yes, your Honor.

THE COURT: Are you willing that he speak?

THE DEFENDANT: I beg your pardon?

THE COURT: Are you willing to have him go ahead and testify under those circumstances?

THE DEFENDANT: Yes, your Honor, because we seem to feel that it is crucial that the Court be made aware of what went on as relates to this case so that you have everything at your disposal.

THE COURT: But you do understand, do you not, that reasonable breadth of cross examination will be permissible here and that once something has been revealed which is either work product or confidential communication with a client or whatever you may call it, that that may in some direct or indirect way come back to affect you adversely at a future time and that you are giving up a valuable right and I could only permit you to give it up if you know that you have right and if you know that you are giving it up and if I am satisfied that you are doing it voluntarily and intentionally and with full information concerning the matter to permit you to make a rational judgment.

Do you understand all that?

THE DEFENDANT: Yes, your Honor, I do.

THE COURT: Is there any question about it?

THE DEFENDANT: No. Regrettably, we are in a position where we must go forward to convince the Court that --

THE COURT: Are you waiving your privilege under the circumstances?

THE DEFENDANT: If that's the only basis under which Mr. Edelbaum can testify, then I am going to waive it.

THE COURT: I can't take a conditional waiver.

MR. DERSHOWITZ: I think I can speak for my client on this matter.

Our position, which was discussed, is that we will waive the privilege insofar as and only insofar as we ask on direct examination questions which we regard as essential for the full elucidation of facts on this new trial motion. We do not make a full and complete waiver of the confidentiality, although at this point, we have no reason to withhold any information, but as a matter of prudence and precaution against future events.

THE COURT: You see, I might make a mistake in my ruling as to the scope of cross examination and once you make such a waiver you accept that risk.

It will be my intention to be fair with your client in this regard, but the scope of cross examination is a very delicate question. The old statement in the State Courts is that you opened the door and if you open the door to a particular transaction or to a particular event or a particular issue, you may have done so for purposes of this hearing to the extent that the goverment can get whatever cross examination is necessary to put the facts in proper context.

MR. DERSHOWITZ: Your Honor, we would of course prefer if the government has no reason for thinking that

this testimony is not entirely accurate that the matter be stipulated to in relevant respects.

In the absence of that, we see no choice but to go forward and we would again invite the government to do that.

MR. PEDOWITZ: Your Honor, I have before me two affidavits of Mr. Edelbaum that have been submitted in connection with this motion. They are far, far more narrow than the proposed testimony which Mr. Dershowitz has set forth. I would frankly like to hear the witness testify. I do not wish to stipulate to matters that I have never heard about before and when counsel wasn't given an opportunity to submit affidavits in support of this motion.

THE COURT: I haven't read Mr. Edelbaum's affidavits, but are you prepared to stipulate the truth of those affidavits?

MR. PEDOWITZ: I am prepared, your Honor, to stipulate that they are in fact affidavits. I don't wish to stipulate to the truth of them, your Honor.

MR. DERSHOWITZ: I think perhaps we really do have to go forward.

THE COURT: All right. Are you going to waive the privilege or aren't you, Mr. Ostrer?

THE DEFENDANT: I am going to waive it, your Honor, so that Mr. Edelbaum can testify.

THE COURT: All right, I will permit you to do that. Bring in Mr. Edelbaum.

M A U R I C E E D E L B A U M, resumed.

CONTINUED DIRECT EXAMINATION

BY MR. DERSHOWITZ:

THE WITNESS: Has there been a waiver, your Honor?

THE COURT: Yes, I am prepared to find on this record that there has been a waiver and it has been a knowledgeable and intentional waiver after Mr. Ostrer has been fully advised I believe, by his own attorney and also I know he has been fully advised by the Court, and catechized in some detail. He has waived.

THE WITNESS: Thank you, your Honor.

THE COURT: I would suggest, and I know I do not need to do that with anyone with your lengthy experience at the Bar, but I will ask both the questioner and the witness that the questions be narrowly framed and that the answers be strictly responsive.

THE WITNESS: They will be, your Honor.

THE COURT: So that the Court does not fall into any difficulties in this matter.

MR. PEDOWITZ: We would prefer that while the questions be narrowly framed, that they not be leading.

MR. DERSHOWITZ: We have no intention of asking leading questions of this witness, your Honor. I would not presume to lead this witness, your Honor.

BY MR. DERSHOWITZ:

Q As the result of your conversation with Mr. Ostrer, the contents of which I am now not asking you about, as a result of that conversation, did there come a time when you had a meeting with the witness Aubrey Moss in your office?

A There did.

THE COURT: Does the Court understand that Mr. Moss telephoned you and asked you for an appointment to see you?

THE WITNESS: I think that what would be more appropriate, I was informed by my client that Mr. Moss had communicated with him that he wanted to see him. I advised my client not to see him. I advised my client to tell Mr. Moss that my advice was that he wasn't to speak to Mr. Moss.

Subsequently, Mr. Moss called my office.

THE COURT: I have ruled that I would not take the prior part of it, but I will take the testimony as to the fact that there came a time when Mr. Moss telephoned your office and asked you for an appointment.

THE WITNESS: Yes.

THE COURT: Now, when was that?

THE WITNESS: The trial took place in January, your Honor. I would have tc place it from my best memory either early in January just before the trial started; it might have been the first day or so, or it would have to be prior to about the 17th or 18th of December, because from that period I always and did go that year, to my home in Florida.

THE COURT: You returned to New York from Florida by the 17th or 18th?

THE WITNESS: No, I went down about the 17th and I returned the first day after New Year's.

THE COURT: Very well.

THE WITNESS: May I have the date the trial started?

MR. PEDOWITZ: January 4th.

THE WITNESS: This could have been -- was that on a Monday; January 4th?

MR. PEDOWITZ: I frankly don't recollect.

THE WITNESS: It could help me, if I would know.

THE COURT: That's normal procedure around here to start big trials on Mondays.

THE WITNESS: It may have been started on

Tuesday, becauseof the fact I always like a day, but it was either early the first two days of the trial or it could have been back in the first part of December.

THE COURT: Before the government rested?

THE WITNESS: Oh, yes, your Honor.

THE COURT: All right.

BY MR. DERSHOWITZ:

Q Can you describe to the Court what Mr. Moss told you at that meeting?

THE COURT: First, let's find out where it was and who was present.

MR. DERSHOWITZ: I'm sorry, he answered that it was in his office.

THE WITNESS: I haven't answered that it was in my office.

THE COURT: He certainly did not, Mr. Dershowitz.

Q Was the meeting in your office?

A It was.

Q Can you tell the Court who was present at that meeting?

A Just myself and Mr. Moss.

Q Can you describe to the Court what Mr. Moss told you at that meeting?

A Yes.

MR. PEDOWITZ: Your Honor, I object to that. It is hearsay.

THE COURT: For purposes of this hearing, I will take it subject to a motion. Give us the substance of what Mr. Moss said to you and what you said to Mr. Moss.

THE WITNESS: I asked him why he came to see me. He said he was going to be a witness in the case and had been subpoenaed by the government and that he wanted to help Mr. Ostrer.

I said to him, "Well, all I want, if you are here, just tell me what the truth is of the case, what you know."

He told me that Mr. Ostrer had told him about this stock and that if he would put up a sum of money, the amount I don't remember, that Mr. Ostrer would guarantee him that he would have no loss and they would share in the profits 50-50.

Q As the result of your conversation --

THE COURT: Have you given the complete conversation?

THE WITNESS: That's the substance of what he told me.

THE COURT: Did you tell him anything?

THE WITNESS: Yes. I told him I didn't know

whether I wanted him as a witness and I told him -- very frankly, your Honor, I was very skeptical of the man. I suspected him. Being a lawyer practicing criminal law for so many years, he being a witness for the government, I felt very -- the fact that he had called Mr. Ostrer, that he wanted to see me, he might be trying to set me up and I wasn't being set up, not today or not then and I was suspicious of him and I gave him a short visit.

I said I would let him know.

Q As the result of that meeting and that conversation, did you arrive at a judgment as to whether you would call Mr. Moss as a witness for the defense?

A I did.

Q Can you tell the Court what your judgment was?

A I certainly would never call him as a witness for the defense, for two reasons:

Knowing that he must have testified before the grand jury; knowing that he must have made a statement to the United States Attorney, not being in a position to get that statement if I offered him as a witness under the Jencks Act because I would be calling him as a witness for the defense and would not be entitled to that.

I made the judgment that I would never call him as a witness. I made the judgment that if he was called as

a witness, I would cross examine him.

THE COURT: You said there were two reasons. Is that all the reasons?

THE WITNESS: The first reason, I suspected him. The second reason was that I knew there was a statement, your Honor, which I couldn't get. The second reason was he must have testified before the grand jury. That was not available to me. If I called him and if his testimony was adverse to what the government had on the grand jury testimony, that would be disastrous as a witness and that would hurt my case rather than help it and that was my independent judgment.

THE COURT: When you say you were skeptical, you believe he was either untruthful or trying to set you up?

THE WITNESS: The main reason he was trying to set me or my client up or both. I did not like the man. That's my independent judgment.

THE COURT: Because of his demeanor?

THE WITNESS: His demeanor, his protestations. He did not mean to hurt, he wanted to get his money back, that was his story. It led me to believe that if I offered him his money back, that's what he was trying to get me to say or something like that and that's one of the reasons --

that's the other reason, your Honor.

THE COURT: You had never laid eyes on the man?

THE WITNESS: I never saw him in my life, but your Honor, I have been selecting juries for forty something years, and I did not like him and I did not trust him.

Q Had you been told at that time that Mr. Moss had made a prior statement indicating that he was "out to get Ostrer"?

A I was told that by my client. I had no independent knowledge of it.

THE COURT: You were told that prior to this meeting?

THE WITNESS: Oh, of course.

Q Had you also been told by your client that he had made other statements consistent with Mr. Ostrer's innocence?

A Yes, sir.

Q Was it your trial strategy at the time, following the meeting--

MR. PEDOWITZ: I object to that and ask it be stricken.

THE COURT: It certainly is leading.

MR. PEDOWITZ: It is leading and it is

certainly hearsay.

THE COURT: I am not so sure I won't take it for purposes of this hearing, but you see, you left the last question hanging. You asked the witness was he told that Moss had made other exculpatory statements. Now, it means nothing to the Court without knowing what they were.

MR. PEDOWITZ: And that's hearsay and we object to that.

THE COURT: For purpose of this particular issue, the state of mind of this attorney may become relevant. His state of mind presumably was acted upon by his experience, by his observations of Moss, by his knowledge of the ordinary factors bearing upon trial tactics and of which he has just mentioned to us and I will take it, but let's find out what were these other exculpatory things that he heard from Mr. Moss or that he heard Moss had told other persons.

Q Can you indicate to the Court, in general?

A Yes. I had heard that Ostrer was innocent, that he made an investment with him and that he didn't think Ostrer was out to defraud him, but everything went bad. It looked like he was going to make some money and the whole thing collapsed.

THE COURT: You had heard prior to the meeting

that Moss had made these statements in substance to other persons?

THE WITNESS: That's correct, your Honor.

Q Did you discuss with Mr. Ostrer subsequent to that meeting your plan for cross examining Mr. Moss if the government called him as a witness?

A Well, not exactly like that, Professor. When Mr. Moss left me, I called Mr. Ostrer on the telephone, I told him I didn't like the fellow, I told him I thought he was trying to set us both up, I said I didn't trust him, I said I would never call him as a witness and I said the only way I would handle him if he was called as a witness for the government, is in cross examination.

That's about the substance of what I told him, Professor.

Q Did you believe at that time that it would be useful to the defense if the government were to call him as a government witness considering the information you had?

A In my evaluation of him as a witness from my talk with him, I thought he would be a poor witness for the government and that I would have a little party with him if he took the witness stand, yes.

Q And was it your expectation that you would --

MR. PEDOWITZ: On that we would stipulate.

THE COURT: What?

MR. PEDOWITZ: That Mr. Moss was not a very good witness and everyone appreciated that.

THE COURT: Come on, Mr. Pedowitz, don't delay the examination.

Q Was it your expectation that if Mr. Moss took the witness stand for the government, you would not only impeach his credibility, but adduce from him testimony derogative to himself?

A Of course. I do that in every case, Professor, not particularly in Mr. Moss' case.

THE COURT: You really do that or do you reach a value judgment that you are going to treat the witness as truthful and favorably or that you are going to treat him as a liar, one or the other?

THE WITNESS: It all depends on how he impresses me, your Honor.

THE COURT: But you don't try to cut it down the middle?

THE WITNESS: I try, but, you know, your Honor--I will say no question. I was taught years ago that the best strategy is if a witness hurts you, waive him off without his cross examination. I have done that very often, your Honor.

Q Were you aware at the time that there was in existence a contract specifying the sharing of profits?

A I saw it.

THE COURT: When did you see it?

THE WITNESS: Before the trial.

THE COURT: Before the meeting with Mr. Moss?

THE WITNESS: Oh, of course.

Q Was it your expectation to introduce that contract into evidence through Mr. Moss if Mr. Moss took the witness stand for the government?

A Of course, Professor.

Q Did you sometimes meet with Mr. Ostrer in his office during the course of the trial?

A I think I recall me being picked up by a car, we would stop by his office, we would have a conversation for a short time and he would take me back to my office just so I can get my phone calls, wait for me and go back to my apartment which I had at that time at 44th Street and Second Avenue and I would havethe daily copy delivered to my home and we would spend the evening working for the next day.

MR. DERSHOWITZ: No further questions of this witness, your Honor.

THE COURT: Is there any cross examination?

MR. PEDOWITZ: Yes, your Honor.

MR. DERSHOWITZ: Your Honor, I do have one further question.

THE COURT: All right.

BY MR. DERSHOWITZ:

Q Do you know an attorney named Julius November?

A I do.

Q To your knowledge, did the attorney Julius November work in a legal capacity with Mr. Louis Ostrer?

MR. PEDOWITZ: Objection, your Honor.

THE COURT: Sustained.

MR. DERSHOWITZ: No further questions of this witness.

THE COURT: I am not precluding the line of inquiry. My ruling is as to the form of that question.

MR. DERSHOWITZ: Okay, your Honor.

Q Did you confer with Mr. November in connection with the criminal case against Louis Ostrer?

A I did.

THE COURT: Did you retain Mr. November to assist you in any fashion?

THE WITNESS: No. Mr. November was Mr. Ostrer's civil attorney and handled many of his civil affairs. He was very interested in the criminal case and he was very interested in what we were doing and I would confer with him

and tell him and ask him certain questions of what he may have known of the case.

Q Did Mr. November on occasion, during the course of the criminal trial confer with you at counsel table?

MR. PEDOWITZ: Objection, your Honor.

MR. DERSHOWITZ: What is the basis?

MR. PEDOWITZ: Vagueness. Conferred about what?

THE COURT: I don't know that it is that vague. Either he did or he did not. I will allow that.

A On a few occasions he came to the table.

THE COURT: When did you first commence to confer with Mr. November about this indictment?

THE WITNESS: Oh, I think I conferred with him in November or early December of 1972, your Honor. It was somewhere in that area.

MR. DERSHOWITZ: No further questions of this witness.

CROSS EXAMINATION

BY MR. PEDOWITZ:

Q Mr. Edelbaum, I don't think we have met. My name is Larry Pedowitz.

A I never had the pleasure.

Q Mr. Edelbaum, you have testified that you did not

believe it would advisable to call Mr. Moss as a witness. Did you ever suggest to the Court that the Court call him as a witness?

A No.

THE COURT: Was an argument made in summation as to the failure of the government to bring in Mr. Moss?

THE WITNESS: I may have. I probably did, your Honor.

MR. PEDOWITZ: I have no recollection of that, your Honor.

THE WITNESS: I said I may have because it is my practice to always tax the government with the missing witness. I may have done it.

THE COURT: Certainly.

Q But in fact, Mr. Moss was equally available to you?

A Of course.

THE COURT: That's what the Judge then tells the jury, but they don't pay any attention.

Q So you testified that a copy of the agreement between Mr. Ostrer and Mr. Moss was made available to you prior to trial, is that correct?

A That's my best memory, that I saw a copy of it.

Q Do you recollect, sir, that it was included

within the pre-marked exhibits that Mr. McGuire provided to you prior to trial?

THE COURT: Government's exhibits?

MR. PEDOWITZ: Yes, your HOnor.

A I can't tell you yes or no.

THE COURT: Were these 3500 exhibits or exhibits that Mr. McGuire was proposing to introduce? What are we talking about here?

MR. PEDOWITZ: I am talking about, your Honor, exhibits that Mr. McGuire indicated that he might introduce at trial, all relevant exhibits were pre-marked and supplied to Mr. Edelbaum prior to trial.

THE WITNESS: You know, my best memory is that Mr. McGuire was very loathe to give me anything unless it was absolutely necessary.

Q Sir, is it your testimony that you did not see a copy of that particular document offered by Mr. McGuire to you?

A I have no independent recollection . I do remember having seen it before the trial and I could not tell you yes or no now, this is two years ago, I have had many, many situations since.

THE COURT: Who were the signatories to this agreement?

THE WITNESS: Mr. Ostrer and Mr. Moss, I believe.

THE COURT: Did Mr. Ostrer testify in this trial?

THE WITNESS: No, sir.

Q And Mr. Moss did not testify?

A He did not.

Q And Mr. Evans did not testify, is that correct?

A He did not.

Q Were you aware of the fact that Mr. Evans had precisely the same type of an agreement with Mr. Ostrer?

A I had seen it.

Q You did not call Mr. Evans as a witness?

A No, I did not.

Q Sir, did it occur to you that the hold-harmless aspect of that particular agreement might indicate that Mr. Ostrer who was agreeing to hold Mr. Moss harmless, might know the manipulation since he was making a commitment to hold a man harmless for his loss on a particular stock transaction?

A I really don't understand your question.

Q Sir, were you aware of the fact that the agreement contained a hold-harmless aspect?

A Yes.

Q And that Mr. Ostrer was agreeing to hold Mr. Moss

harmless?

A Yes.

Q Sir, did it occur to you when you decided not to call Mr. Moss as a witness, that that might cut against Mr. Ostrer's position that he knew nothing about the manipulation?

A That didn't occur to me. That wasn't the reason I didn't call him.

Q Did it occur to you that that might cut against your position at trial?

A No.

Q You are aware of the fact that Mr. Evans' agreement also contained a hold-harmless agreement?

A I was.

Q That Mr. Ostrer was to reimburse anybody for any loss suffered as a result of purchasing the stock?

A Correct.

Q Did you know, sir, that Mr. Moss had been repaid in part by Mr. Ostrer between the time of his SEC testimony and his grand jury testimony?

A I know he had been paid some money. I don't know when it was paid.

Q By Mr. Ostrer?

A I believe so.

Q Sir, did you consider in deciding not to call Mr. Moss as a witness that it might look odd that Mr. Ostrer had repaid Mr. Moss between the time he testified in the SEC and the time he testified in the grand jury?

A No, it did not. I am not testifying that I know that the payment was made in the time that you specified. I am accepting your representation that that's when it was paid.

Q That is my understanding.

MR. PEDOWITZ: That is my understanding, your Honor. I do not know for certain.

A I want it to be clearly understood that I don't recall when it was paid so I cannot testify when it was paid, but I am accepting your representation that it was paid then.

THE COURT: But you did know that it had been paid sometime?

THE WITNESS: Yes.

Q Sir, were you aware of the fact that Mr. Moss' agreement to purchase stock was only for 2,000 shares of stock?

A I don't remember the amount of the shares.

Q Do you recollect, sir, that the commitment which Mr. Hellerman testified to at trial which Mr. Ostrer had,

was that he was to purchase [illegible],000 shares of stock?

A I really don't remember the amount of stock.

Q But it was in fact a substantial amount of stock in addition to that --

MR. DERSHOWITZ: Objection to the characterization, your Honor.

THE COURT: Sustained.

Q Sir, was there also testimony at trial that Mr. Ostrer, because of his difficulties in raising money, had to borrow money from one Hickey DiLorenzo?

A I don't really recall whether that came out or not.

Q Sir, you don't recollect that Mr. Hellerman testified that Mr. DiLorenzo had to be involved in this transaction?

MR. DERSHOWITZ: Your Honor, objection. He is asking the witness as to matters which are matters of record and the witness' testimony as to what the record reflects does not seem to be relevant to this proceeding.

THE COURT: Read back the question please.

(Question read.)

THE COURT: I think this witness may be examined within reason as to his present recollections bearing on the weight to be given to the balance of his testimony and

on that basis I will overrule the objection.

MR. PEDOWITZ: Your Honor, I might also add that I am laying a predicate for further questions.

THE COURT: You have tried a few cases since January of '74?

THE WITNESS: Your Honor, I used to be involved from September to June every day before a jury until about a year or so ago. I have a cardiac condition and my wife got on my back. I am only taking two or three cases a year now. I am staying out of many multiple defendant cases that I have been offered so as not to be in a protracted, lengthy case.

THE COURT: I will allow the question.

MR. PEDOWITZ: Thank you, your Honor.

Q Mr. Edelbaum, to retract for a moment, do you recollect that Mr. Ostrer, according to Mr. Hellerman's testimony, had committed himself to purchase a substantial amount of stock for which he was not able to raise all the money --

MR. DERSHOWITZ: Objection, your Honor. You already sustained an objection to this.

THE COURT: Yes, I am sustaining an objection to the use of the word "substantial."

Q Sir, do you recollect that according to Mr.

Hellerman's testimony, Mr. Ostrer committed himself to purchase stock which he was unable to pay for and of necessity had to go to a loanshark to purchase the stock?

MR. DERSHOWITZ: Objection, your Honor, to the characterization in the question.

THE COURT: Well, yes. It is a compound question in any event.

Q Sir, do you recollect Mr. Hellerman's testimony that Mr. Ostrer committed himself to purchase stock of Belmont Franchises?

A Yes, I do, sir.

QD Do you recollect, sir, that Mr. Ostrer according to Mr. Hellerman's testimony, was not able to raise all of the money for the stock he committed himself to purchase?

A I have that memory, yes.

Q Do you recollect, sir, that according to Mr. Hellerman's testimony, Mr. Ostrer had to find another source of funds to purchase the stock?

A I don't know about "had to," but that he did try to.

Q And was one of those sources a man by the name of Hickey DiLorenzo?

A The name rings a bell.

Q Sir, did Mr. Ostrer provide you with Susan

Gold's statement?

MR. DERSHOWITZ: Your Honor, the government represented that these questions were designed to lay a predicate for other questions and now after laying a predicate he seems to be going into an entirely different line of questioning.

THE WITNESS: Who is Susan Gold?

THE COURT: Just a moment.

I don't see any relation to this prior question.

MR. PEDOWITZ: I may come back to it if --

THE COURT: Don't argue. Let's get on with this hearing.

Q Sir, were you supplied at any time with a statement by Susan Gold to Mr. Ostrer or Mr. November in preparation for your cross examination or expected cross examination of Mr. Moss?

A I don't know. I don't even know who Susan Gold -- I have no recollection of who Susan Gold is.

Q Do you recollect, sir, being supplied with any piece of paper either by Mr. Ostrer or anyone associated with Mr. Ostrer, in preparation for Mr. Moss' cross examination which concerned in part Mr. Moss' sexual relationship with another woman?

A I was not provided with any paper. I had been

something about it. That's about the extent as I remember, sir.

Q What were you told, sir?

A That he had some kind of a sexual relationship with some woman which was not proper or something that he could be cross examined about.

Q Could he be cross examined about that, sir?

THE COURT: Under those rules as they then existed.

A I don't believe so.

THE COURT: Just to make it clear, what we are talking about here is an accusation of adultery, is that right?

THE WITNESS: Yes,your Honor.

MR. PEDOWITZ: Yes, your Honor. Among other things.

THE COURT: Well, now, that's a totally meaningless statement.

MR. PEDOWITZ: Your Honor, I will offer at this time the statement that Susan Gold gave to Mr. Ostrer and Mr. November if that will be helpful to the Court.

THE COURT: It won't necessarily be helpful. This witness says he didn't receive that. He said he received oral information to the effect that the witness

possessed or the possible witness Moss had engaged in an adulterous relationship and that's all this witness told us.

THE WITNESS: Now as I reflect, I didn't think much of that to being used in cross examination.

Q Is it because under the rules of this court you are not permitted to question about prior bad acts not resulting in conviction, is that correct?

A That's correct, your Honor. Correct, sir.

Q Sir, you had a meeting with Mr. Moss.

A Yes, sir.

Q And you did not think much of his demeanor?

THE COURT: You know, I don't see much point in repeating what this witness has testified to.

MR. PEDOWITZ: Fine, your Honor.

Q Sir, did you ever have any indication that Mr. McGuire had in your words "set you up"?

A Mr. McGuire?

Q Yes.

A Oh, I never said that.

Q When you referred to being "set up," you mean only by Mr. Moss?

A Correct.

Q You do not imply that the federal government

had anything to do with it?

A No. I think very highly of Mr. McGuire.

THE COURT: Anybody who defends a substantial number of criminal cases faces the risk of being set up. Nobody questions that, do they?

THE WITNESS: I have lasted for forty-eight years that way, by being very careful.

THE COURT: You can't set somebody up who won't be set up, can you? Isn't that true? You can't set up a man who is not willing to be set up.

THE WITNESS: No, of course not, your Honor.

Q Mr. Moss asked you whether or not he could get money from Mr. Ostrer?

A I did not say that. He said something that all he's interested in is getting his money back, something like that. That's all he was interested in. That raised a red flag right away.

Q Sir, you indicated that one of the reasons that you did not want Moss to be called as your own witness was that you would be unable to get his grand jury testimony?

A Correct.

THE COURT: You know he told me that. I heard it. It is a valid statement.

Q Did you ask Mr. McGuire whether or not he would

give you the grand jury testimony of Mr. Moss?

A No, I did not want him to laugh in my face.

Q Did he ever laugh in your face, sir?

A Oh, we had a very pleasant relationship during the trial.

Q Sir, if you had asked the Court to call Mr. Moss as a witness, would you have been entitled to his grand jury testimony?

A I don't believe so.

Q Do you know that for a fact, sir?

A Not for a fact.

THE COURT: Is that a common practice at a criminal case, to ask the Court to call somebody as a witness?

THE WITNESS: It is very uncommon, and to be very frank with you, knowing Judge Edelstein and the experience I had during that trial which I don't want to go into, I didn't think that he was the type of judge that would grant such a request.

THE COURT: Let's forget this particular trial and address yourself to your knowledge.

THE WITNESS: It is very rare.

Q Did you consider it, sir?

A No.

Q Did you raise it?

A No.

THE COURT: There is a reason for it?

THE WITNESS: Yes.

THE COURT: Because the trial judge is going to call to the attention of the jury that this witness is called as the Court's witness?

THE WITNESS: That's right.

THE COURT: And that would make it look like something it is not?

THE WITNESS: That's right.

MR. PEDOWITZ: Your Honor, I frankly didn't follow that. I'm sorry.

THE WITNESS: I did.

THE COURT: Thank you.

Q He would in fact be the Court's witness if he was called as a witness, would he not?

A Yes.

Q And you would be entitled to cross examine him, would you not?

A Yes.

Q And Mr. McGuire would be entitled to cross examine him?

A Yes.

THE COURT: The point, Mr. Pedowitz, and I assume your last comment was not intended to be sarcasm --

MR. PEDOWITZ: I certainly did not intend it to be sarcasm, your Honor.

THE COURT: We believe, and when I say "we," I mean attorneys, because the judges in this court are all attorneys, we believe that when a witness is presented to a jury of laymen, if the jury is told this next witness is being called as the Court's witness, well, that's fine in a civil case where you have a doctor or a demolition expert or an atomic scientist or a computer expert or even a fingerprint expert, perhaps, but once you do that the jury may take that witness and give him a little more weight than they would if he were called by the government or the defer e who are antagonists.

The Court is neutral in the trial and if the Court puts the imprimatur on the witness and says "Look here, jurors, this next witness is my witness," that is not too desirable because they are likely to give the witness greater credibility and I think any capable experienced counsel will think twice before he puts the Court in a position of calling a witness whose credibility he doubts and I gather from his testimony he doubts the veracity of Mr. Moss.

MR. PEDOWITZ: I understand that, your Honor.

THE COURT: All right, let's go on to something else.

Q Sir, did you ever ask Mr. McGuire to stipulate to the admission of the hold-harmless agreement without calling Mr. Moss as a witness?

A I did not.

Q Sir, you testified that you conferred with Mr. Julius November at the counsel table. Was Mr. Julius November sitting with you during the course of the trial at the counsel table?

A No. I think he may have come up to the table and spoke to me and made certain suggests or something like that.

Q While Judge Edelstein was conducting the trial?

A Yes.

It may have been in the recess.

Q Using the word conditional may have, sir, did he approach your table or not?

A Yes.

Q You have a clear recollection of that fact?

A Yes.

Q On how many occasions did he approach your table?

A Three or four times during the trial.

THE COURT: This is while the trial is in session or during recesses?

THE WITNESS: I think it may have been during the recess. It wasn't while the witness was being cross examined. There was a lull of some kind. It wasn't actually during the time when the trial was actually taking place where he would be interrupting, because Judge Edelstein would not like that.

THE COURT: I don't think anybody would like that.

Q You are aware of the fact Mr. November was a friend as well as a lawyer of Mr. Ostrer's?

MR. DERSHOWITZ: Objection, "friend."

A I knew he was his lawyer. As to whether he was his friend, I don't know about that.

THE COURT: There is no jury here. The objection was almost as foolish as the question. We went through that on Monday. I don't see the purpose. The question invited the answer the knowledgeable witness gave you the answer.

MR. PEDOWITZ: No further questions, your Honor.

MR. DERSHOWITZ: No further questions.

THE COURT: Thank you, Mr. Edelbaum.

(Witness excused.)

THE COURT: All right, who's next?

MR. DERSHOWITZ: We would like to call as our final witness, your Honor, Mr. November.

J U L I U S N O V E M B E R, called as a witness on behalf of the defendant, having first been duly sworn, testified as follows:

MR. SILVERGLATE: May I do the examination, your Honor?

THE COURT: Yes.

DIRECT EXAMINATION

BY MR. SILVERGLATE:

Q Are you an attorney, sir?

A I am.

Q Since what year?

A February, 1934.

Q Are you a member of the New York Bar?

A I am.

Q Have you been a trial attorney at any time in your career?

A I have on many, many occasions.

Q Would you estimate how many cases you might have tried?

A 150; 200.

THE COURT: During your career, have you ever

been associated with the State Legislature in any way?

THE WITNESS: No, I was not.

THE COURT: Including as a staff member or counsel to a committee?

THE WITNESS: No. Really not.

Q Have you represented Mr. Louis Ostrer on any occasions?

A On many occasions.

Q When did you first meet Mr. Ostrer?

A In or about the year 1961.

Q When did you first represent Mr. Ostrer?

A I think I would say -- my best recollection would be, sir, about 1962 or '63.

Q Does that include or does it not include litigation cases?

A Yes. I havehad litigation cases and have some involving him right now, pending.

Q I'm sorry, I will let you finish.

A PArdon me?

Q I will let you finish. I think I interrupted you.

A No, I don't think you did. I said I had some which are still pending.

Q Did Mr. Ostrer come to you after he was indicted

in the Belmont case?

A He did, or perhaps more factually, I went to see him.

Q Did you undertake any role in that case?

A Yes. He asked me to look at the indictment, to look at the bill of particulars, and examine it, which I did.

Q As a result of your examination, did you do anything else in the case?

A Yes, I did.

Q I am not asking you for any conversations with Mr. Ostrer, I am just asking you for what you did in the Belmont case.

A I will tell you what I did, as I recollect, it was that on several occasions I talked to Mr. Maurice Edelbaum, who was his trial counsel. On other occasions -- on another occasion, I interviewed a lady by the name of Susan Gold who was employed in the office where Louis Ostrer was situated at 377 Fifth Avenue, New York.

THE COURT: When did you do that?

THE WITNESS: I did that towards the end of 1972, your Honor. I would say several weeks before the start of the instant case.

Q Did you interview Ms. Gold in connection with

the upcoming Belmont trial?

A I did, sir.

Q And did you have discussions concerning the possible use in the trial of information given to you by Susan Gold?

THE COURT: All right, now, before --

A Conversation with whom?

THE COURT: Before he answers that and before we get into this possible work product situation which we have discussed earlier, I think we ought to ascertain if Mr. Ostrer is taking the same position with respect to this attorney as he has with Mr. Maurice Edelbaum.

MR. SILVERGLATE: With respect to work product?

THE COURT: Yes, or communications, if any of them come out as a result of this examination.

MR.SILVERGLATE: May I have one moment, your Honor?

THE COURT: Yes, certainly.

(Pause.)

THE COURT: Mr. Ostrer, do you understand the same rules and privileges apply to this witness as I discussed with you before as to the other witness?

THE DEFENDANT: Yes, your Honor, I do.

THE COURT: Are you willing to have him testify

to the same proceedings followed with respect to Mr. Edelbaum?

THE DEFENDANT: Yes, your Honor, I do.

THE COURT: Now, responsive and precise answers not to open up any questions not directly contained within the question --

THE WITNESS: I understand, Judge.

THE COURT: All right, I will find that as to this witness, Mr. Ostrer has also made a knowledgeable and intentional waiver after being fully advised.

MR. SILVERGLATE: Thank you, your Honor.

THE COURT: There is no difference in substance between this situation and that concerning Mr. Edelbaum. Do you understand that?

THE DEFENDANT: Yes, your Honor, I do.

THE COURT: All right.

Q Did you have discussions with Mr. Edelbaum concerning the use of any of the information that you had from Susan Gold with respect to possible examination of Mr. Moss?

A I did, sir.

Q Did you have a view as to whether it would be--

MR. PEDOWITZ: Objection. Leading.

THE COURT: Well, I think it would have been

leading.

Q Did you have an intention as to what use you -- did you have discussions with Mr. Edelbaum as to whether or not it was likely that Moss would take the witness stand?

A As to whether or not it would be likely?

Q Yes.

A Well, I had discussions, but I could not say that I had discussions of whether it would be likely for I had no knowledge whether he would or would not take the witness stand.

Q Did you discuss with Mr. Edelbaum how to handle Moss in the event that he did take the stand?

A I certainly did.

THE COURT: When were these discussions?

Q When were these discussions?

A Several weeks before the commencement of trial, which would be late fall of 1972.

THE COURT: And where were they?

THE WITNESS: Most of them were held at 377 Fifth Avenue, New York. One might have been held at the office which Mr. Edelbaum occupied at the time, which I think was 253 Broadway, prior to the time he moved into the office of Whip & Atlas uptown.

THE COURT: Who was present at these discussions?

THE WITNESS: At these discussions Mr. Edelbaum and Mr. Ostrer and myself.

MR. PEDOWITZ: Excuse me, some clarification.

At all of the conversations Mr. Edelbaum was present?

THE WITNESS: I didn't hear that.

THE COURT: I think that's what he said.

MR. SILVERGLATE: I only asked about discussions with Mr. Edelbaum in that last question.

THE COURT: Yes.

MR. PEDOWITZ: These are only conversations with Mr. Edelbaum?

THE COURT: At which Mr. Ostrer was present.

MR. PEDOWITZ: All right.

Q Did you, during the course of the trial, confer with Mr. Edelbaum concerning the ongoing case?

A I did. He also conferred with me. I was in the courtroom most of the time except when urgent business took me away.

Q How many days of the trial were you not present?

A Well, I should say I might have missed two altogether, but outside of that, I was there more or less during the entire trial.

Q What were the reasons that you missed the couple

of days of the trial?

A The reasons that I missed -- why?

Q Yes.

A I think I said, Professor, that I missed these because urgent business required my attention elsewhere and I could not have anybody else in my office take care of these items.

MR. SILVERGLATE: No further questions, your Honor.

MR. PEDOWITZ: Your Honor, to the extent that this goes beyond the scope of the direct examination, I wish to make this individual my witness.

THE COURT: All right, since he is a practicing lawyer we don't want to bring him back here unnecessarily and I really would like to include matters, so you may do that.

THE WITNESS: Thank you, Judge.

MR. PEDOWITZ: Could we have this marked as the next Government's exhibit?

(Government's Exhibit AA was marked for identification.)

CROSS EXAMINATION

BY MR. PEDOWITZ:

Q Mr. November, I believe we have been introduced.

My name is Larry Pedowitz.

A Yes. I met you Monday. You introduced yourself.

THE COURT: Monday of this week?

THE WITNESS: Monday of this week, sir, when I was asked to come here as a witness.

THE COURT: All right.

Q Mr. November, I am showing you a document marked as Government's Exhibit AA for identification. I ask you, sir, can you identify that document?

MR. DERSHOWITZ: Can you tell us what that document is?

MR. PEDOWITZ: His affidavit.

A Yes, I do. This purports to be a copy of an affidavit that was submitted here. Yes, sir.

Q Is that your affidavit?

A IT is, sir.

Q Sir, referring to this paragraph -- do you wear glasses?

A I haven't worn glasses since 1939.

Q Fine.

Sir, do you adhere to your statement that in no way or manner did I threaten directly or indirectly to compromise or blackmail Mr. Moss. On the contrary, all of

the discussions with Mr. Ostrer were to determine facts and circumstances, to weaken and/or discredit any testimony that might be offered by Mr. Moss were he to be called as a witness on behalf of the plaintiff?

A I certainly do adhere to that, Mr. Pedowitz.

Q Sir, did you assist Susan Gold in the preparation of an affidavit concerning among other things, Aubrey Moss' sexual relationship with Ms. Gold?

A I did not assist her.

Q You did not assist her?

A I did not assist her.

Q Sir, did you say this to Mr. Ostrer on November 21, 1972 -- your Honor, you will excuse the language.

THE COURT: All right.

Q "I break my ass to come here to get this fucking thing out. She's kind enough to do it. The girl is shitting in her pants knowing."

A I imagine that I said that, but I still say I didn't assist her.

Q You did not assist her in the preparation of the affidavit?

A I did not assist her. She told me facts and that statement alludes to it that albeit I was there to have

her put it down. There was nobody to do it. That's why I used the language. I spent an hour talking to the young lady who was visually upset because of the relationship she disclosed between herself and Mr. Moss.

Q You did not assist in the preparation of the affidavit?

A No, I did not assist. I did not put any words in her mouth.

Q The affidavit is completely in her language and you did not write out the affidavit?

A I wouldn't say that. I said in her presence, as I recollect, I dictated it and she read it and she said it was all right, but I didn't assist her, I didn't tell her what to say.

MR. PEDOWITZ: May we have this marked as Government's Exhibit BB.

MR. DERSHOWITZ: Your Honor, may we see the exhibits before they are shown to the witness?

THE COURT: You can see them as they are being marked.

(Government's Exhibit BB was marked for identification.)

THE COURT: Next question, please.

MR. DERSHOWITZ: Your Honor, I think we would

like to make a legal argument with respect to this document.

THE COURT: He hasn't offered it as I understand it. It may be only that he intends to use i tto refresh the witness' recollection.

MR. DERSHOWITZ: Even to refresh the recollection, your Honor. At least we ought to place on the record some matters about this affidavit. We have not seen --

THE COURT: Which number is this?

MR. PEDOWITZ: This is Government's Exhibit BB, your Honor. This is not in fact an affidavit, it is a statement, a typewritten statement signed Susan Benet Gold.

THE COURT: He can show a witness a copy of the Herald Tribune, if he wishes to refresh his recollection.

MR. DERSHOWITZ: There is no question he can show him a copy of the Herald Tribune. It may not be proper for the United States government to be using in any manner whatsoever a document which was not only unconstitutionally seized from our defendant in this case, but which the State of New York has affirmatively represented to this defendant it did not seize.

We would like to get from the government the sourceof this document, when it got this document. There is a potential perjury matter involved here, your Honor.

THE COURT: There are too many trials within a trial here. I haven't seen this document. I think I will have to excuse the witness and hear the argument.

Would you just step out. Don't go too far away because this isn't going to be long.

(Witness temporarily excused.)

THE COURT: All right, as soon as the witness leaves you can start right at the beginning.

MR. DERSHOWITZ: We would like to know the government's source of this document.

MR. PEDOWITZ: This document was supplied to me by the State, your Honor.

THE COURT: By the State, you mean by the District Attorney of the County of New York?

MR. PEDOWITZ: That's correct, your Honor.

MR. DERSHOWITZ: As I understand it, this document probably -- the only possible basis we know this document could have been obtained, because we have no copies, is that it was seized from Mr. Ostrer's vault by a totally unlawful search and a totally unlawful seizure, based on totally unlawful wiretaps.

Not only that, but in ther inventory that the State indicated was seized, there was no mention of that document. Repeated requests have been made to obtain from

the State inf. .ation as to whether they seized that document and repeatedly no indication has been made that that document was seized.

As far as we were concerned, that document was not seized and did not exist.

THE COURT: Is the lady still alive, Ms. Gold?

MR. DERSHOWITZ: I have no personal knowledge of that. I think she is, yes. She is a young woman.

MR. PEDOWITZ: I have been advised by the defense, your Honor, that she is in fact alive, that she is now married and that she is -- the defendant's indeed indicated she would not like to have anything to do with this particular matter.

MR. SILVERGLATE: I stated to Mr. Pedowitz, but Mr. Dershowitz doesn't know, that I learned from Mr. Ostrer that she is alive, she is happily married, she got married since this affidavit was done and we made a decision not to stir up her life at this time in connection with this matter since it was not necessary, we thought.

MR. PEDOWTIZ: Your Honor, I have no information whatsoever indicating -- I don't begin to represent that Mr. Dershowitz did not make requests for this document. But I have no information that the State has ever denied that it had it. I find that frankly as a surprise.

Mr. Dershowitz is absolutely correct if this document was seized in connection with a search of Mr. Ostrer's office after the wiretaps came to an end --

THE COURT: Was the search held to be unlawful?

MR. PEDOWITZ: Since the wiretaps were unlawful, I assume that the search was probably based on that, your Honor.

On the other hand, we are going to hear a tape recording in which this affidavit was discussed at great length and if Mr. Dershowitz wishes to keep the affidavit out, then I have no particular objection, but I assumed that we were using the tapes and they were unlawfully seized and this document seems to be an essential part of the transactions on November 21, 1972.

MR. DERSHOWITZ: Before I take my position, I would at least like to be able to read the document in its full form.

THE COURT: I thought you read it.

MR. DERSHOWITZ: No, I just this minute learned about the existence of this document. It was handed to me, and to protect the record, I simply had to make this objection and what we would call for is a three minute recess.

THE COURT: In a minute or two we will have a recess so you can read it and confer with each other

It presents an unusual circumstance, because here we have in effect a victim of an unlawful intrusion by wiretapping, relying on the wiretaps to present a prima facie basis here for his motion which I am now hearing.

Now, it seems to me that once you introduce the wiretaps you have opened the door to the admission of anything which is directly connected with these wiretaps and which is part of the same illegal surveillance or intrusion or search or whatever you want to call it.

Number one, they can't offer this affidavit, or whatever paper it is, and I have not seen the paper we are talking about, they cannot over it as evidence to the truth thereof, they can merely show it to the witness to refresh his recollection and I don't see that under the circumstances of this case where the victim of the unlawful search is relying on the fruits of the search, that it would be proper to permit him to exclude some and let in others.

MR. DERSHOWITZ: Your Honor, as I say, it does not seem fruitful to argue the point now because we don't even know what our position is in relation to this document, but in response to that, there are two very different searches.

THE COURT: Yes, but one is bad because it is

rglt [30]

tainted by the prior one, isn't that right?

MR. DERSHOWITZ: That's right. It may be independently bad, your Honor. It may be independently has no basis.

THE COURT: I have no basis of thinking that.

MR. DERSHOWITZ: My sketchy glance of the document suggests to me we will affirmatively want it admitted but we would request a recess and avoid all [illegible].

THE COURT: All right, we will take a recess.

(Recess.)

MR. DERSHOWITZ: Your Honor, may we state our position with relation to this document?

THE COURT: Perhaps you ought to tell me when it was seized. That might put the whole thing to rest.

MR. DERSHOWITZ: I can only speak from surmise. I guess the government has direct information.

THE COURT: Wait a minute. Wasn't it seized as a result of a search and seizure of your client's office?

MR. DERSHOWITZ: We were told by the State that it was not seized during that seizure because the government was asked to return all documents seized in that seizure. They returned all documents and this was not returned.

THE COURT: You mean the people of the State of

New York, not the government.

MR. DERSHOWITZ: No, the State of New York.

It was on February 21, 1973.

THE COURT: What is your basis for saying -- the search and seizure was on February 21, 1973?

MR. DERSHOWITZ: Yes.

THE COURT: What is your basis for suggesting to the Court that that paper was a product of that seizure?

MR. PEDOWITZ: Your Honor, there is no question in my mind having spoken to the District Attorney's office about that seizure, that the seizure was directly connected to the wiretaps.

To the extent that the probable cause for the search, therefore, arose from the wiretaps, there can be no question in my own mind that it was an illegal search and seizure.

MR. DERSHOWITZ: Our basis is the warrant itself for the search which we do have, lists among the things to be seized, a statement by a person concerning one Moss, Aubrey, relating to the coercion of a witness in a criminal case.

So we presumed that it was seized, although, of course, we don't know whether it was actually seized. All we know is that the government asked the magistrate for

permission to see it.

THE COURT: The individual's alive and it has so limited --

MR. DERSHOWITZ: Our position on that is now clear.

THE COURT: I don't know why we have to even get into it. I don't see the need. It has such limited utility. It is only available for the impeachment of Mr. November.

MR. PEDOWITZ: Your Honor, I will leave it out.

MR. DERSHOWITZ: No, your Honor, our position is now, and I would like to have this stated on the record.

THE COURT: Everything is on the record, Mr. Dershowitz.

MR. DERSHOWITZ: I'm sorry.

We were looking for this document for weeks, because we wanted to introduce this document in trial on our own behalf. We asked Mr. Ostrer, we asked Mr. November for these documents, and they told us, of course, that --

THE COURT: Save my time. Introduce it in evidence. I will take it right now.

MR. DERSHOWITZ: Fine. It is introduced in evidence.

THE COURT: All right.

(Government's Exhibit BB received in evidence.)

THE COURT: Let me see it to see what this is all about.

Let Mr. November come back in.

J U L I U S N O V E M B E R, resumed.

MR. DERSHOWITZ: Your Honor, we would however request in the interests of Miss Gold that the document be sealed if there is no objection from the Government.

MR. PEDOWITZ: Your Honor, I think far more than the document would need to be sealed in order to protect Miss Gold's reputation in this matter. The tape would have to be sealed.

THE COURT: Let's not get into this discussion. I will reserve on the application to seal the document.

Does the Court understand that at some point in time Miss Gold was an employee of Mr. Ostrer or his company?

MR. PEDOWITZ: That was the testimony on direct examination, your Honor.

MR. DERSHOWITZ: Yes, sir.

THE COURT: What was the period during which she was employed there?

MR. PEDOWITZ: It is my understanding she was there fore quite a number of years, your Honor. The exact dates I don't know.

MR. DERSHOWITZ: She was certainly employed during the relevant period of time and may we call your Honor's attention particularly to the last part of the statement.

Mr. Ostrer informs us she was employed approximately eight years.

THE COURT: That's what it says in her statement.

All right, certainly her name is not relevant and I will see what can be done to protect the record so there will be no problem for her.

MR. PEDOWITZ: Your Honor, may I have the document?

THE COURT: Yes, certainly.

MR. PEDOWITZ: Thank you very much.

CROSS EXAMINATION (Continued)

BY MR. PEDOWITZ:

Q Mr. November, I am showing you a document which has been marked as Government's Exhibit BB for identification and I ask you, sir, if you recognize that document.

A I haven't read it entirely but I recognize it.

Q What is that, sir?

A That's a statement given to me by the party whose name is signed thereto.

Q Susan Gold?

A Susan Gold on the 21st day of November 1972.

Q Thank you, sir.

Sir, on the date that statement was prepared did you read that statement to Mr. Ostrer?

A I don't recollect.

Q Did you show it to him?

A I may have because he was not in the room where this was done. That's why I am not so certain now.

Q Sir, in connection with your testimony today, did Mr. Silverglate or Mr. Dershowitz or anyone connected with Mr. Ostrer or Mr. Ostrer play for you a tape of a conversation had with Mr. Ostrer on November 21, 1972 in which you discussed this statement of Susan Gold?

A No one played any tape to me, sir.

Q Did you read a transcript prepared by the Government in connection with your testimony?

THE COURT: Is that your testimony here today you are asking?

MR. PEDOWITZ: Yes.

A I'm sorry, I lost you. Will you repeat that question? I didn't quite get that.

Q Certainly. In connection with your testimony here today did you read a transcript of a conversation you had with Louis Ostrer on November 21, 1972

A You mean obviously prior to today?

Q That's correct.

A The answer is no, no.

THE COURT: Does this question present some difficulty for you?

THE WITNESS: Well, the question presented difficulty because of the way Mr. Pedowitz put it, it wasn't quite clear. He said in connection with the testimony you gave here today --

THE COURT: Have you at any time prior to this moment read any transcript or listened to any playing of a recording made of that date of a conversation in Mr. Ostrer's office at which you were present?

THE WITNESS: No, your Honor. As a matter of fact I said never at the end. The answer is no. I just wanted the question clarified because to me it didn't seem too clear.

THE COURT: Everybody has read United States versus Bronston in the Supreme Court.

THE WITNESS: I did, too.

THE COURT: Everybody has.

THE WITNESS: I represented him in Tax Court.

Q Sir, on that date after the preparation of this affidavit did you advise Mr. Ostrer that Susan Gold wanted

more money?

A I don't say that, but I do recall that she said she thought she had never been paid the wages that she was entitled to and she thought she merited more money. Not because of this, but because she thought she was entitled because she had been there sometime.

Q And your testimony is that her request for more money had absolutely nothing to do with her supplying this affidavit?

A That's right. She told me so.

Q Sir, in connection with your discussion of this affidavit on November 21, 1972, during the course of that conversation did you tell Mr. Ostrer that Susan Gold wanted more money?

A I believe that after the completion of it and after she had signed it I mentioned that she thought that having been with his organization so many years she should have been given a raise long before.

Q Sir, was she in fact given a raise?

A I don't know.

Q Sir, who was Susan Told employed by?

A Well, that raises a question. I was of the opinion that she was employed by one or more of the corporations that had its place of business at 377, but I

couldn't tell you offhand by whom.

Q Sir, I show you again Government's Exhibit BB for identification and I ask you to read the first two lines of that statement.

A Fringe Programs, Inc.

Q Mr. Ostrer was connected with Fringe Programs?

A Yes, he had a connection.

Q Sir, were you the president of Fringe Programs?

A I was at one time.

Q Were you the president of Fringe Programs in 1972 and 1973?

A I think I was.

Q She was your employee, wasn't she?

A No, she wasn't because that was not within the scope of my duties. I had nothing to do with payroll or the amount of remuneration.

Q But you mentioned to Mr. Ostrer that she would like to get more money?

A Not that way. I said that having been employed in or about that place at 377 Fifth Avenue, regardless of whom the employee might have been technically, she thought that she merited a long overdue raise.

Q She was very upset that day about having to give you this affidavit?

A She wasn't upset about giving the affidavit, but she was upset over the fact that she put herself she thought in a vulnerable position because of her relationship with the purported witness.

THE COURT: She was a single person at that time?

THE WITNESS: I believe she was. I think that she had been divorced three or four years prior thereto. She was to the best of my knowledge.

THE COURT: How old was she?

THE WITNESS: I would say at that time she was about 26 to 27, 28 at the most.

Q Sir, you have had a business connection with Mr. Ostrer for quite a number of years, have you not?

A Business connections?

Q Yes.

A I wouldn't say it was a business connection. I have been associated with him.

Q You have lent him money?

A I did.

Q Sir, when you walked into Mr. Ostrer's office on November 21, 1972 with this statement in hand did you not ask Mr. Ostrer for money?

A I don't recall. Did I ask him for money?

Q Sir, I am asking you a question.

A I don't recall. I may have asked him for more money because I had loaned him moneys that were long overdue.

Q At the conclusion of your conversation with Mr. Ostrer about this affidavit did Mr. Ostrer write you a check?

A I can't recall. He may have. He has written me many checks.

Q Sir, during this conversation of November 21, 1972, after showing Mr. Ostrer this statement do you recollect saying in words of substance, "He won't take the stand with this. He can't afford to. He will be disgraced."

A I may have said it. It sounds like my language.

Q Sir, who had copies of the statement?

A To the best of my knowledge, outside of the one that was produced here today I had an original and a copy. Nobody else.

Q You told Mr. Ostrer that he wouldn't take the stand, is that correct, with this document?

A I think I said that in substance, yes.

Q Did you anticipate, sir, that he would be shown a copy of the document?

A No, I didn't anticipate he would be shown a copy, but I did anticipate that Miss Gold, who had lunch with him two, three times a day would tell him about it.

Q Miss Gold was to get an increase in pay, is that correct?

A What is that?

Q Miss Gold was asked about an increase in money, is that correct?

A She had been asking for that for a long time.

Q Sir, were you aware of the fact that Miss Gold received an increase in pay within two weeks?

A I said I was not, sir.

Q Did you suggest to Mr. Ostrer that Susan Gold approach Moss and let him know about the affidavit so as to --

A No, I did not.

Q You did not?

A No.

Q Sir, do you recollect saying to Mr. Ostrer in words of substance, "Nobody will be around we know. Who the hell, if she is sitting with him in a restaurant, is going to be wired."

MR. DERSHOWITZ: Your Honor, objection.

THE COURT: Overruled.

Q Do you recollect saying that, sir?

A I don't recollect that, but I said a moment ago, sir, that I said that because of her intimate and close relationship with Mr. Moss she would be having lunch with him and she would talk with him about it. I said that two minutes ago.

Q But you were concerned that he might be wired, is that correct?

A I don't know if I would be concerned, but maybe I was. I can't recollect today.

Q Did you say that, sir? Did you make reference to the fact that Mr. Moss might be wired when he met this woman in the restaurant?

A Possibly.

Q That was of concern to you?

A Probably.

Q Do you still adhere to the statement in your affidavit that, "You did not threaten indirectly to compromise Mr. Moss"?

A I did not threaten him. I didn't meet him.

Q Indirectly, sir?

A Pardon me?

Q Indirectly?

A I don't know what indirectly means.

Q Sir, you put it in your affidavit, did you not?

A I didn't --

THE COURT: That shows the uselessness of affidavits. Don't worry about it. Let's go on to something else. You can't try issues of fact from affidavits. People knowing they have an issue of fact very well should not make affidavits.

Q Did you suggest to Mr. Ostrer that it would be best not to show the affidavit to Mr. Edelbaum until and if Mr. Moss took the stand?

A I don't recollect that, sir.

Q Sir, do you recollect telling Mr. Ostrer in words or substance if he got wind of the fact she is going to testify to the relationship he wouldn't take the stand? He is destroyed if he is cross examined on this and "he will," excuse me, your Honor, "shit."

A That sounds reasonable.

THE COURT: He isn't asking you wnether it sounds reasonable.

THE WITNESS: I may have said that.

THE COURT: Do you have any doubt that you said that?

THE WITNESS: I don't know the exact language, but I will assume I said that.

Q You anticipated, sir, that he might get wind of the fact that Susan Gold had given this statement, is that correct?

A That who might get wind of it?

Q Mr. Moss.

A I told you, Mr. Pedowitz, on two or three occasions, knowing the intimate relationship between them.

THE COURT: Just answer the question.

A That she had lunch two or three times, that she would tell him about it. I have answered that.

Q Sir, do you recollect telling Mr. Ostrer in words or substance "only tell Edelbaum if it comes to trial if he is going to be a witness."

A I may have. Mrs. Gold had employed me not to let people know about it

Q Sir, let me ask questions.

A I tried to answer.

Q Sir --

THE COURT: Don't argue, gentlemen.

THE WITNESS: I'm sorry, Judge.

Q Sir, did there come a time in the conversation with Mr. Ostrer when Mr. Ostrer asked you how to let Mr. Moss know that you got the affidavit?

A I don't recall that.

rgjb 13 November - cross

Q Do you recollect this conversation in words or substance:

"Mr. Ostrer: How do you get him to let you know you got this?

"Mr. November: Well, then, in that case, I guess, you see, let's see what he talks to her about tomorrow.

"Mr. Ostrer: Cause we got to be very, very, very careful with this.

"Mr. November: Yea, she may then later on tell him, listen, if you are gonna take the stand, Aubrey, you hear.

"Mr. Ostrer: Yea, go ahead.

"Mr. November: Then so as a decent human being, no matter what it could do to me, I have got to show what a low skunk you are. Follow me.

"Mr. Ostrer: Yea, go ahead.

"Mr. November: I don't think he's gonna take the stand. What do you think of that? You've got dynamite here as you put it yourself. Now we have to talk at length here, probably Friday or Monday."

Sir, do you recollect that conversation in words or substance?

A Yes.

Q You anticipated, sir, that Mr. Moss might not

rgjb 14 November - cross

take the stand, is that correct?

A I answered that. I said that Miss Gold said she was going to have lunch with him and I knew she would have lunch with him.

THE COURT: No, please just answer the question.

A All right, sir, I had doubt that he would take the stand.

Q Sir, at the conclusion of this conversation Mr. Moss gave you a check for $750 from Fringe, is that correct?

A Mr. Moss did not give me anything.

Q Excuse me, Mr. Ostrer.

A I think he did because I think that was a month's compensation for acting as lawyer for Fringe and Fringe was behind several months.

Q Had Mr. Ostrer before you showed him this statement refused to give you a check?

A He had not, but when I was there it was not uncommon for me to remind Mr. Ostrer or Mr. Greenfield that Fringe was behind months and that my bill showed it.

Q Sir, did you represent Louis Ostrer at the trial of this particular matter?

MR. DERSHOWITZ: Objection. That calls for a legal conclusion.

THE COURT: I suppose it does. I think you can start right out. Did you enter your appearance on the record at any time?

THE WITNESS: No, I did not.

THE COURT: Are you admitted to practice in this Court?

THE WITNESS: I am.

THE COURT: You could establish what he did and the Court will determine from that whether he represented him or not.

Q Sir, you in no way participated in the questioning of witnesses, is that correct?

A I did not, sir.

THE COURT: Did you sit at the counsel table?

THE WITNESS: I did not. I saw in the first row.

THE COURT: By first row, you mean row of spectators?

THE WITNESS: Right.

Q Sir, do you recollect telling Mr. Ostrer in words or substance that the sexual relationship which Mr. Moss had had with Miss Gold would be admissible to impeach his credibility?

A I probably did.

THE COURT: What was Moss' occupation?

THE WITNESS: I didn't know. He was a businessman and I knew he was in New Jersey and he had various businesses, but I only saw him on two or three occasions in my life. I never knew what business he was in.

Q Sir, when was the last time you tried a criminal case?

A Well, let me see. Some years ago I tried the case of the People against DeMato.

Q Sir, how many years ago?

A Five.

Q Have you ever tried a case in Federal Court, a criminal case in Federal Court?

A No.

MR. PEDOWITZ: Pardon me, your Honor, just for a moment.

I have no further questions, your Honor.

THE COURT: Anything else for this witness?

MR. SILVERGLATE: Yes, your Honor.

REDIRECT EXAMINATION

BY MR. SILVERGLATE:

Q Mr. November, did you want Mr. Moss to take the stand?

A I had mixed feelings or emotions about that.

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Q Was there anything that you wanted to get out of him if he did take the stand?

MR. PEDOWITZ: Objection, your Honor.

THE COURT: I will take it.

A Well, I think that in addition --

MR. PEDOWITZ: That he wanted?

THE COURT: That he wanted Mr. Edelbaum to get from the witness. I think that's what the question was.

MR. SILVERGLATE: Yes.

A I think yes. It would be as I recollect reading the document and the bill of particulars it was charged that an illegal conspiracy among the various parties -- that Mr. Louis Ostrer, the defendant here, was to give 50 per cent of any profit on the sale of the stock I think to Mr. Herman who was the Government's witness, and yet Mr. Ostrer had an agreement, I think it was in writing, with Mr. Moss whereby he was also to give Mr. Moss 50 per cent, so it was my feeling --

THE COURT: 50 per cent of the same?

THE WITNESS: Yes. So it was my feeling that somewhere something went amiss because I couldn't believe any man in his right mind would agree to give 50 per cent to one man and 50 per cent to the other and not lose his mind and also Mr. Ostrer was charged that he lost

$120,000 in the Belmont stock.

Q Did you think it was important if Mr. Moss took the stand he should tell the truth?

MR. PEDOWITZ: Objection.

THE COURT: Don't you want to hear the answer to that?

A I think every witness is supposed to tell the truth. That's my feeling as a lawyer.

THE COURT: Yes.

Q You are aware, are you not, of certain things that he told Susan Gold that were favorable to Mr. Ostrer, were you not?

A Yes, I was.

Q Did you have some of those in the affidavit?

A Yes.

Q The affidavit that you just saw?

A Yes.

Q The affidavit of Susan Gold?

A Yes. I knew that Susan knew that Mr. Ostrer -- I didn't know the amount, had paid back somewhere between 12, 15 or $18,000 to him and that Mr. Moss knew that Mr. Ostrer himself was was a big loser and not a gainer in this transaction.

Q Were you also aware that Susan Gold had told you

about Mr. Moss' attitude towards Mr. Ostrer, his unfavorable attitude?

A That's right. He said I really have -- I really have nothing against him, I just want to get my money back. I knew he was a loser here, too, and he meant well.

Q Did you feel that Mr. Moss knowing that Susan Gold might be a witness would help elicit the truth or would elicit falsehoods?

A I had assumed, as I said before, Mr. Silverglate, that he would tell the truth.

THE COURT: Regardless of whether he was charged with adultery?

THE WITNESS: That's right. I said a witness is supposed to tell the truth. That's my view.

Q Did you believe that it was more or less likely that he would tell the whole truth if he knew that Susan Gold was available as a witness?

MR. PEDOWITZ: Objection, your Honor.

THE COURT: If he knew.

MR. SILVERGLATE: If Moss knew that Susan Gold was available as a witness.

THE COURT: Objection overruled.

A Yes, I think he would because I think this would

impel him to tell the truth rather than have his clandestine relationship all over the world, all over the United States with Miss Gold brought out considering he was a married man with children living with his wife at the time. I did.

Q Did Susan Gold tell you about prior statements that Moss had made to her about Ostrer?

A You would have to give me a period of time. I mean, I don't know -- Mr. Silverglate, I am not the interrogator.

THE COURT: Yes, please. Next question.

Q Do you know if Susan Gold got a raise?

A I answered before I did not know. I had no knowledge.

Q Do you happen to know whether Moss eventually met Gold?

A Met what?

Q Whether Susan Gold met Moss --

MR. PEDOWITZ: Objection, your Honor.

A I can't tell you. I never inquired. I can only tell you she said that she was going to have lunch with him; that he was calling her every few days to have lunch with her and see her.

Q Were you aware that a written contract existed

rgjb 21 November - redirect

setting forth th. financial agreement between Ostrer and Moss?

MR. PEDOWITZ: Objection. Leading.

THE COURT: It is repetitious.

Just wait a minute. You are a lawyer. You say you are a lawyer. Giver the Court an opportunity to rule on the objection.

THE WITNESS: Apologies.

THE COURT: Next question.

MR. SILVERGLATE: No further questions, your Honor.

THE COURT: Anything else?

MR. PEDOWITZ: A few very brief ones, your Honor.

RECROSS EXAMINATION

BY MR. PEDOWITZ:

Q Mr. November, on your redirect examination you were asked whether you thought there might be things about Mr. Moss' testimony that might be helpful to Mr. Ostrer and you said that you recollected from the bill of particulars and the indictment what the case was all about, is that correct?

A I did say something like that, right.

Q Sir, isn't it a fact that you have reviewed

Mr. Ostrer's affidavit in connection with this proceeding in which he states that one of the things that he hoped to bring out with respect to Mr. Moss was this 50 per cent relationship?

A An affidavit when may I ask?

Q This last year, sir.

A I did not see that.

Q And you have had no discussions with Mr. Ostrer which might have refreshed your recollection about that particular matter?

A No. The only recollection that I had was that at the time in November of 1972 Mr. Ostrer told me, you know, I have this arrangement to give him 50 per cent and he said now in hell, pardon my language, Judge, could I be giving him 50 per cent and giving the other fellow 50 per cent, it's absurd.

Q And that, sir, is the way you recollect that particular aspect of the case?

A That's right.

Q Sir, was there ever any claim made at the Federal trial that Mr. Ostrer had made money in this particular case?

A I don't know.

THE COURT: I thought you said you were there

all the time.

THE WITNESS: Yes, but I don't know that there was any claim that he made money. Yes, some of the witnesses indicated that he was to watch the stock zoom from 4 to 20 and make money in that regard, that's right.

Q Sir, the question was, was there any claim that Mr. Ostrer had in fact made money?

MR. DERSHOWITZ: Your Honor, the question is unclear. Claim by who?

THE COURT: Overruled. By the Government he means.

A I don't think that the Government made that claim directly. The Government merely said there was a conspiracy to rig stock.

THE COURT: That's right. That's all you had to say in one overt.

THE WITNESS: That's what I understand and that was the gist of the dispute the fact there were many, many counts.

MR. PEDOWITZ: I have no further questions, your Honor.

THE COURT: Anything else from this witness?

MR. SILVERGLATE: None, your Honor.

THE COURT: All right, sir, you are excused.

(Witness excused.)

MR. DERSHOWITZ: Your Honor, we have no further witnesses. We would like an opportunity to play the tapes for your Honor and to demonstrate the particular relevance of some logs.

THE COURT: I can probably do that tomorrow. I have another hearing scheduled this afternoon. If I finish that today I will be able to continue with you at about 10:00.

MR. DERSHOWITZ: 10:00 tomorrow morning?

THE COURT: Yes.

As I understand it you have nothing further except that you want to play the tapes and make some argument to the Court based on the plant reports?

MR. DERSHOWITZ: Yes.

THE COURT: That's all you have?

MR. DERSHOWITZ: Yes.

THE COURT: What about you, Mr. Pedowitz?

MR. PEDOWITZ: Your Honor, I have some tapes to play, all of which you have transcripts for. I would, however, request that the Court listen to the actual tapes because I believe the new ones involved ought to be listened to.

THE COURT: Yes, of course.

MR. DERSHOWITZ: We join in that request, your Honor.

THE COURT: But except for the listening of the tapes and hearing Mr. Dershowitz' argument about the plant reports, the hearing is complete.

MR. PEDOWITZ: Would your Honor require oral argument with respect to the law or written memoranda?

THE COURT: If I take written memoranda they should be short and concise, but I think that would be the way to do it.

MR. DERSHOWITZ: We would like an opportunity at the close of the tape presentation to make a very brief fact argument tying up the tapes and the logs because they are rather complex.

THE COURT: All right, we will do the best we can. Come back at 10:00.

MR. DERSHOWITZ: Does the defendant have to be here for the tape listening?

THE COURT: I would think he ought to be here. I think it's important for a defendant to be present in all matters. In fact he is on bail and I think he ought to be here. I didn't complain that he stepped out into the hall, that's reasonable if he wants to do that, but I should think he should generally speaking be here

throughout the proceedings.

MR. PEDOWITZ: Your Honor, may I make one final argument with respect to the tapes? Mr. Dershowitz has not claimed as I understand it that any information was turned over to the Federal Government other than the fact Mr. Moss might be tampered with and that Mr. Lynch --

THE COURT: Can't we hear this tomorrow, Mr. Pedowitz?

MR. PEDOWITZ: Yes. I am trying to cut short the tape listening.

THE COURT: You see, I have had this extensive hearing and now the attorneys say the Court should not rely on the transcripts but the tapes.

It seems reasonable. If I find during the mid-morning that the tape listening is generally unproductive I may terminate it.

MR. DERSHOWITZ: I don't think the tape listening is going to be very extensive.

THE COURT: I will listen to it at 10:00 tomorrow. The matter is continued for all purposes until 10:00 a.m. tomorrow. You are continued on your bail, Mr. Ostrer, to be here tomorrow morning.

THE DEFENDANT: Thank you.

THE COURT: All right.

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WITNESS INDEX

Name	Direct	Cross	Redirect	Recross
Harold F. McGuire (Resumed)	307	309		
Maurice Edelbaum	314	348		
Julius November	366	373	400	405

EXHIBIT INDEX

Government	Identification	In Evidence
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[412]

UNITED STATES OF AMERICA

vs. 71 Cr. 558

LOUIS OSTRER

March 4, 1976
10 a.m.

- - -

(Hearing resumed.)

THE COURT: I will resume the hearing, gentlemen.

I understand at this time you want to play some tapes?

MR. DERSHOWITZ: Yes, your Honor.

Your Honor, there were three very small matters that we just wanted to place on the record. As to two of them -- I guess as to all three of them, there are really no problems at this point. One is we would like to be certain that the District Attorney's office is under subpoena to search their files for the critical Fine notes.

Now, we understand that they are making a good faith effort to do so, but we would simply like them to make the kind of effort that is required for them to make under law if they are under subpoena.

THE COURT: That is a good faith effort.

MR. DERSHOWITZ: I understand that, but a legally

binding good faith effort and just to bind --

THE COURT: I really don't understand the point you are making. I really don't regard the standard as being different. They are not parties to the action, and as I understand it, if they didn't they would forfeit $50.

MR. DERSHOWITZ: It seems to me the sanction, I would imagine, would be more significant if there was any kind of an intentional withholding if it was pursuant to subpoena.

We are not suggesting that any such is happening. We would just like to communicate with them that they are legally obligated by subpoena to make that search.

THE COURT: I think they know that. The difficult thing is that the two people who testified are no longer employed there. Mr. Mollo of course knows that, he did testify, but he didn't testify in his capacity as an Assistant District Attorney.

MR. DERSHOWITZ: Mr. Scotti --

THE COURT: No, Mr. Mollo is not an Assistant District Attorney.

MR. DERSHOWITZ: Yes.

THE COURT: What is it you want to do? I will go along with anything reasonable.

MR. DERSHOWITZ: We would simply like the

government to communicate to the District Attorney's office that they are under a subpoena in an obligation to make a thorough search of their files for those notes.

THE COURT: Any problem with that?

MR. PEDOWITZ: None. It's been done already, your Honor.

THE COURT: The record will so indicate.

MR. DERSHOWITZ: The other matter is this:

During the course of this hearing several surprise documents of great significane have been produced by the prosecution, including the affidavit yesterday of Susan Gold, the McGuire notes, the little telex from Moss.

We would simply again like the government to be under a current and continuing obligation to disclose to the defendant any documents of that kind that they may have in their possession and that they for one reason or another have decided not to use at this hearing if those documents bear in any real way on the matter before this Court.

THE COURT: That's a remarkably broad and sweeping direction, but I believe I am authorized to make it

If you have any documents which are either exculpatory or relevant they must be disclosed.

MR. PEDOWITZ: Your Honor, it's a very -- as you say it is a very broad request. I have attempted to prove

my case. I was not subpoenaed with regard to any documents. I produced documents at this hearing which I thought were relevant. I will examine my files again to determine whether or not there is anything that might be helpful to Mr. Dershowitz, but I have made an examination of all documents and talked to the witnesses and determined that if there is anything else in my files, that it would be helpful to Mr. Dershowitz.

THE COURT: Perhaps Mr. Dershowitz would narrow his request so that it would have greater force.

MR. DERSHOWITZ: Generally --

THE COURT: What is it that you want?

MR. DERSHOWITZ: I am speaking about documents of the nature, of the kind that have been produced.

THE COURT: I don't think that's too meaningful.

MR. DERSHOWITZ: Any notes from or to Aubrey Moss from the government, any notes --

MR. PEDOWITZ: Why don't we cover them one at a time. I have no such notes that I have no produced --

MR. DERSHOWITZ: Any notes by Mr. McGuire or by Mr. Fine dealing with this matter.

THE COURT: No, dealing with whether or not Aubrey Moss will be called as a witness or what he would testify to if called --

representation to that fact.

THE COURT: And all the operative facts in this case are later than that.

MR. DERSHOWITZ: Yes.

MR. PEDOWITZ: Yes, and I might add that I called the New York office of the FBI to check as to whether or not they had ever employed a James Lynch. They said they had a James J. Lynch who was no longer employed and I spoke to a Mr. Sweeney who has been in the office for some fifteen years and he said that while he was in the office Mr. Lynch was not there.

So I assume that that is the same Mr. Lynch and that he must have been employed some time prior to 1960.

MR. DERSHOWITZ: I spoke to Mr. Lynch on the telephone and he told me that he had left the employ of the FBI in 1954, had worked for the Waterfront Commission I think between '54 and '56 and had been a licensed citizen investigator since 1956.

I think the record also reflects that the State made no such inquiry which a simple telephone call would have revealed.

THE COURT: They suspected hewas a renegade FBI agent. He was not. The government may have made an inquiry and ascertained that he was not or they may have done nothing.

MR. DERSHOWITZ: Right.

THE COURT: -- not dealing with this matter. With this matter, probably fills a couple of file drawers.

MR. DERSHOWITZ: Or which deals were Jim Lynch in any way or which deals with material overheard by the State on the wiretap.

THE COURT: Let's go back to Jim Lynch for a moment. As I understand this record, State prosecutors thought that perhaps Jim Lynch was a renegade FBI man. That is to say that while on the government payroll, he was acting in concert with some of these defendants in this case or their attorneys.

As I understand it, upon inquiry, the U.S. Attorney deiscovered that Mr. Lynch was no longer a federal employee and had never been an FBI agent during the period of time when this case was being developed.

Is that about the size of it?

MR. PEDOWITZ: I think, your Honor, that Mr. McGuire testified that he may have checked. That he did not recollect whether he had or had not, but --

THE COURT: Wasn't the Court advised that Mr. Lynch left the Federal Bureau's employ prior to 1964?

MR. PEDOWITZ: Yes, we conceded that.

MR. DERSHOWITZ: 1954.

MR. PEDOWITZ: On the basis of Mr. Dershowitz's

I don't bring that down to the bottom line in this case. That particular aspect of the matter impresses me somewhat like the tree that falls in the desert. There is no sound because there is nobody there to hear it.

I just don't tie that incident in with the issues that are presently before me. Let's assume that a reliable informant had told Mr. SCotti or Mr. Fine an FBI agent, Jim Lynch, is in and out of Ostrer's office all the time and conferring with Julius November, suppose they had, and the informant had gone to on to say that he either is presently an FBI man or formerly an FBI man, I don't know, and if they had communited that to Mr. McGuire and Mr. McGuire ascertained that his affiliation with the Bureau ended in the 1950s or Mr. McGuire had done nothing, in either event I don't see that that would be the basis for any grievance on your part or have any rational connection with the motion presently before me.

MR. DERSHOWITZ: The difference, your Honos, is that in this case the government learned about it by intercepting unlawfully a lawyer-client communication and the Supreme Court has held that in the Black and O'Brien cases that any interception of any communication by the government which is transmitted to the prosecutor in the case requires reversal even if no prejudice can be shown and

indeed in the Black and O'Brien cases the only overheard information was about the expansion of a bail application which had absolutely no relevance to the case, so at least for the purpose of the record in this case, we certainly do press the Lynch argument, though we concede that on the record of this case there has been no affirmative showing of direct prejudice to Mr. Ostrer from the learning of that information.

MR. PEDOWITZ: Your Honor, our position is that the O'Brien case and the Black case, they are clearly not the law in this Circuit, and those cases --

THE COURT: I thought they are Supreme Court cases.

MR. PEDOWITZ: They are, your Honor, but they have not been followed by the Supreme Court and they have not been followed by the Second Circuit subsequently.

In the Rosner case the Second Circuit required an affirmative showing of prejudice.

THE COURT: The Rosner case is not over, is it?

MR. PEDOWITZ: That's correct, but that aspect is, your Honor. Certiori was denied as to that aspect of the case.

MR. DERSHOWITZ: That is correct, your Honor. I am the counsel on the Rosner case and there is a petition

for certiori but on a different aspect of the case, but the Rosner case as we will argue in our legal memorandum, is completely distinguishable.

THE COURT: All right.

MR. PEDOWITZ: And there was no interception by the federal government, the interception was by the State and the communication was not at the request of the federal government.

THE COURT: We are going afield, gentlemen.

MR. PEDOWITZ: But a short answer to Mr. Dershowitz's question is that I have no documents whatsoever that indicate that the United States Attorney had knowledge that Mr. Lynch was employed by Mr. Ostrer.

I have no documentary evidence of that except the tapes in which that fact was communicated to Mr. Moss.

MR. DERSHOWITZ: Just to go over the list very quickly:

Any of Mr. Pedowitz's notes of his or Mr. McGuire's interviews with Mr. Moss or any of Mr. Pedowitz's notes of interviews of witnesses for this hearing, if exculpatory.

MR. PEDOWITZ: Well, I most certainly have no notes of any interview with Mr. Moss. I have never met the man or talked to him.

Mr. McGuire, as the Court heard, had no notes of

any interview with Mr. Moss, indeed no notes at all. That was his testimony.

Anything exculpatory in talking with witnesses. Well, I certainly don't feel that anything I have learned from any witness in this case would be exculpatory to Mr. Ostrer as that word might be construed by Mr. Dershowitz.

THE COURT: I would take that word, perhaps, and expand it to say that anything which would if known alter the outcome of this hearing ought to be treated as exculpatory. Of course, when you are talking about exculpatory in its traditional sense, you are talking about the difference between guilt and innocence and that's not an issue tendered at this hearing, but there are issues of fact in this hearing, the results of which will be very important to the defendant and if you have any such notes which you intend to impeach the credibility of a witness with, I believe I would be authorized to direct you to produce them as an extension of what we ordinarily would call exculpatory material .

Under the Brady rule as it has been tremendously extended in this Circuit, under cases like Seijo and the like. This Circuit has expanded the original Brady determination three-fold or maybe more, so if you have any such papers as that I will direct you to produce them under the

theory that they are substantially equivalent to Brady material.

MR. DERSHOWITZ: Our final request --

MR. PEDOWITZ: Your Honor, why don't we treat this now because I don't want to drag this on at some later point.

THE COURT: I am agreeable to taking these things one at a time.

MR. PEDOWITZ: There is nothing whatsoever that I think would alter the testimony of any witness to any material degree. I did have a note and I discussed this fact with Mr. Fine at the time that on the 29th of December of 1972 he had called Mr. McGuire and had asked him whether or not Moss had indeed been resubpoenaed or recontacted so as not to alert him of the fact that there had been some interception.

You recall the testimony that there was concern on Mr. Fine's part that there would be nothing given away to Mr. Moss so that they would learn there was an interception.

MR. DERSHOWITZ: Your Honor, may I respond to that?

THE COURT: One thing at a time. Let's see if has produced everything. You can't give the man three or

four things to deal with at once.

MR. DERSHOWITZ: I want to respond specifically--

THE COURT: No. Let him produce everything that responds to my direction to him to produce.

MR. PEDOWITZ: The diary entry was for December 29th, 1972, and was 8 p.m. and the notations "Called back by Assistant U.S. Attorney Skip McGuire re DOA's case. He only re-subpoenaed witness. No conference with him. Only told to come back with subpoena."

That was the notation.

THE COURT: I don't know what re-subpoenaed means. This man was under subpoena already.

MR. PEDOWITZ: Yes, but Mr. Fine was concerned to have him re-notified and that's what Mr. McGuire had done.

You recall the testimony that Mr. McGuire had his SEC investigator contact Mr. Moss and tell him "You are under subpoena, you are not going to be needed for the 4th of January, but I want you available in any event," and that was precisely what Mr. Fine wanted done, and that was precisely what was done.

THE COURT: Have you responded fully as to my last direction?

MR PEDOWITZ: I am looking through my documents here.

It is a very broad request, your Honor, and I want to mull it over before I make a representation to the Court. I just don't think there is anything else that would be particularly helpful to Mr. Dershowitz.

THE COURT: It isn't a question of something being helpful to Mr. Dershowitz, it is a question of something which would tend in the hands of a skillful cross examiner to impeach the testimony of either of these witnesses of any of these witnesses, I suppose, I will expand it to include all the witnesses called by the government, or affiliated with the government, as to a material point.

You have to stick to the Seijo case in this Circuit, wrongful it might be.

MR. PEDOWITZ: I know, your Honor is very familiar with that case. I also --

THE COURT: It will be back again.

MR. PEDOWITZ: I am under the view also that it was not a correct decision.

MR. DERSHOWITZ: There are two cases before the United States Supreme Court right now on the Seijo issue in which the United States government has claimed that other Circuits have opinions in conflict with Seijo so that should be resoved within a few months.

THE COURT: It is interesting to note that all of these cases that have been reversed in this fashion, on retrial they have been convicted all over again.

MR. PEDOWITZ: That's true.

THE COURT: So it is kind of a squandering of judicial sources, something which looks good in an appellate argument, but it doesn't amount to a can of beans with a jury.

Experienced counsel like Mr. Edelbaum who we had yesterday wouldn't waste his time with it.

MR. PEDOWITZ: This last point I raise simply because I think you have put me in a position where I must, though I think this is a matter which would not be at all helpful if explored. Mr. Fine and Mr. Scotti were contacted by members of the McClenlan Committee about Mr. Ostrer while these wiretaps were in effect. These members of the McClenlan Committee met with these gentlemen and they had discussions about Mr. Ostrer.

Both Mr. Scotti and Mr. Fine told me that nothing that was overheard on the tapes was revealed to any member of the McClenlan Committee.

THE COURT: I didn't ask you about that. I asked you whether witnesses associated with the federal government had made any inconsistent statements to you in prior inter-

views which would constitute Brady material under Seijo.

MR. PEDOWITZ: I had understood that as also including Mr. Fine, your Honor and I don't view that as inconsistent, but it is something which I feel obliged to tell the Court about under the broad obligation which you have just put me under.

THE COURT: Perhaps you misunderstood my direction. The record will indicate that that's been disclosed.

MR. PEDOWITZ: In terms of inconsistent statements none whatsoever. I believe the testimony of the witnesses have been truthful in every respect and my communications with them were wholly consistent with their trial testimony, the hearing testimony.

THE COURT: What else are you requesting?

MR. DERSHOWITZ: May I respond simply to that?

THE COURT: Have you finished your demands for material?

MR. DERSHOWITZ: One more demand for material.

THE COURT: Let's do the demands first.

MR. DERSHOWITZ: Which the government has consented to. We would like to borrow from the government the best copies of the tapes to allow our tape expert to make one limited inquiry which he has indicated to us on the basis of the testimony he would like to make about a possible

re-recording.

THE COURT: All right, if it is agreed to, all right.

MR. PEDOWITZ: Your Honor, that's of course where the copies of the tapes that were sent directly to your chambers and then you gave me to have copies made and I have kept them in my possession since.

THE COURT: I have done all that by stipulation on the record or from letters from Mr. Dershowitz acting as attorney for the defendant.

MR. PEDOWITZ: Right. I would now put these copies into Mr. Dershowitz's hands. I would request, though your Honor, that these tapes, as well as the other tapes that I have prepared for Mr. Dershowitz, not be circulated to anyone outside of Mr. Ostrer and the defense team. I am concerned that this is tainted material and it may in the form of transcripts or otherwise, be rung around the country to people associated with Mr. Ostrer.

MR. DERSHOWITZ: Your Honor, there is simply no problem with that. As evidenced from the witness stand yesterday, we didn't even play the tapes for Mr. November in preparation of his testimony or Mr. Edelbaum. Nobody has heard these tapes except the defense team and Mr. Ostrer and there is no problem.

We have as much interest in making sure these tapes are not communicated as anybody does.

THE COURT: I'm not sure that's so, but whether it be so or not, I will accept your representation.

MR. PEDOWITZ: And I would ask that that obligation continue, that they not be circulated and the transcripts in addition not be Xeroxed or copied.

THE COURT: Yes, I will so direct on consent.

MR. DERSHOWITZ: Your Honor, just one response to the material that's just been turned over to us.

The significance of this material is very great for the following reason:

Mr. McGuire in his affidavit, in his second affidavit, reiterated the fact that in response to our claim that maybe other phone conferences and other conferences occurred, that this was theonly phone call, this was the only information, there was no information, lest there be any doubt this was the only information and here we find there was one other communication directly relevant to this case.

It would have been significant impeachment material for Mr. McGuire. It would also have been impeachment material to elicit the contents of this conversation.

THE COURT: If you want to recall Mr. McGuire

Mr. MCGuire, I will permit you to do so.

MR. PEDOWITZ: I can agree with Mr. Dershowitz's characterization of this particular testimony. This was a call back simply to tell Mr. Fine that Mr. Moss was in fact under subpoena as Mr. Fine had requested him to keep him under subpoena. That is not inconsistent. There were no additional communications, other than to say this obligation he committed himself to fulfil had in fact been fulfilled.

MR. DERSHOWITZ: That's testimony. All we know from this record is that there was a call. We were certainly entitled to inquire as to the contents of the call.

THE COURT: You did inquire and he said there weren't any and that's something the trier of the fact can consider.

MR. DERSHOWITZ: We were told that there were no calls.

THE COURT: By Mr. McGuire, and now you have a document that shows that's not so.

MR. PEDOWITZ: I don't think there were any calls.

THE COURT: He said there was obviously the one call.

MR. PEDOWITZ: No, I don't believe that's true, your Honor. I don't recollect that in the record at all. Mr. Dershowitz did not ask him about any subsequent

communication.

THE COURT: There is a very simple remedy. If it is important, we will have Mr. McGuire come back and submit to further cross examination. I would like to see it in the record myself. I am only going on my present recollection.

MR. DERSHOWITZ: The record is reflected in two places, one in the affidavit about which he would have been cross examined --

THE COURT: You had the affidavit?

MR. DERSHOWITZ: We had the affidavit, but the affidavit indicates no other communications and we would have examined him, but the critical point is this, had we known there was this call, we would have inquired as to what went on in the call. Mr. McGuire had a different recollection once it had been refreshed by this document. Mr. Fine may have had additional notes and recollections and it may turn out as previously that the small note in the diary did not reflect the totality of the conversation.

THE COURT: If you will refer me to the relevant testimony of Mr. McGuire on this hearing and if it accords with my present recollection as to what he testified to, I will certainly re-open his cross examination, limited solely to that particular document which now ought to be marked for

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identification.

MR. PEDOWITZ: That is, by the way, your Honor, not Mr. McGuire's diary; this is Mr. Fine's diary.

THE COURT: It could be a copy of the Herald Tribune. It could still be shown to Mr. McGuire.

MR. PEDOWITZ: Certainly. It was shown to him and read to him and he recollected when I talked to him that in fact there may have been a telephone conversation and nothing substantive was discussed except the fact that the obligation had been fulfilled.

MR. DERSHOWITZ: The government had an opportunity to inquire aobut that, but the defense did not.

THE COURT: Let's not continue this dicussion any further. If you will point out to me the particular point in the testimony of Mr. McGuire on this hearing which justifies re-opening his examination, I will definitely direct it be done.

MR. DERSHOWITZ: Fine.

MR. PEDOWITZ: Your Honor, I would appreciate that could be done now so we don't have another hearing on another day.

THE COURT: I would have to have it on another date anyway. You can't get Mr. McGuire here on such short notice and I agreed with counsel that I would hear the tapes

and I also have some other cases.

MR. DERSHOWITZ: I will look through the testimony while the tapes will be heard, because Mr. Silverglate will be handling the tape material.

THE COURT: Fine. Have we concluded all the discussion so we will now play the tapes?

MR. DERSHOWITZ: Yes.

THE COURT: Who will be playing them?

MR. PEDOWITZ: Your Honor, I pre-marked this for identification.

THE COURT: All right, it is Exhibit B for identification, a note from Mr. Fine's diary. Is that what it is?

MR. PEDOWITZ: Yes.

THE COURT: Mr. Dershowitz, you had that when Mr. McGuire was here?

MR. DERSHOWITZ: No, we did not. The only note we had from the Fine diary was the note on the meeting of the 27th.

MR. PEDOWITZ: Your Honor, the diaries were sitting there. Mr. Dershowitz had an opportunity to look at them and ask --

THE COURT: No, he did not. I restricted the examination to those pages. The last thing in the world I

would permit in this courtroom would be for the attorney for a criminal defendant to be rummaging through the diary of an Assistant District Attorney of New York County. That would be ridiculous.

MR. DERSHOWITZ: I won't represent it, but I think I asked Mr. Fine whether there were any other relevant entries in his diary.

THE COURT: Please, let's stick with the record. That's what we have a record for.

MR. DERSHOWITZ: All right.

THE COURT: Which tapes are you now going to play? Are you playing tapes, Mr. Dershowitz?

MR. DERSHOWITZ: Mr. Silverglate will be playing the tapes as well.

THE COURT: Mr. Silverglate, give a direction on the record as to what tape you are playing and also inform me as to which transcript applies to what you are playing. I believe I would also like to know the date of the recording.

MR. SILVERGLATE: May it please your Honor, to the extent possible we would like to use the government's set of tapes, because that is the clearest set of tapes that we have and also the government machine is louder so that it will be easier to hear.

Some of the tapes are low as it is and it would

would be hard on my machine. The one problem is that the numbering, the footage numbering on the government's machine is different than it is on mine, so what I will have to do is indicate to your Honor the tape, the place on the tape where it is on my machine and the government's then, since I have in advance given the government a listof all the conversation we are listed in, the government will find the place on the government's machine and play it on the government's machine.

THE COURT: Please understand that it is essential for me that I know what transcript number pertains to what is now being played; that I know the date, the purported date of the recording and be able to identify in some fashion, whether by dates, by footage, by transcript exhibit or in some other fashion what I have heard.

Are you playing only matters which are contained within the type written transcripts?

MR. SILVERGLATE: No, there are some matters which are not, although the major portions and the most important portions are on transcript.

THE COURT: I am going to call upon you to identify it fully and clearly for the record and I will not listen to anything unless I am certain that I will be able to reconstruct from the stenographic record of this hearing

what I have heard and what I have not heard.

I want to be very clear about that. I am charging you too, Mr. Pedowitz, if you think it is confusing or will be confusing in the future, to please state on the record whatever is necessary to identify it.

MR. PEDOWITZ: Certainly, your Honor.

THE COURT: All right.

MR. SILVERGLATE: Your Honor, I suggest then for the record that we identify the places on the tapes on Mr. Pedowitz's machine and Mr. Pedowitz's tapes so there is uniformity.

THE COURT: Very well. Unless otherwise indicated tape numbers and footage numbers will be those that the government set.

MR. SILVERGLATE: I understand the government has divided the tapes into three separate categories inasmuch as there were three sources of overhearing. There were two wiretaps and a bug. As I take it, there were three machines recording so the tapes are divided into A, B, and C series.

I have adapted my order to the government's order in that respect, so we will begin with A-1; is that reasonable, Mr. Pedowitz?

MR. PEDOWITZ: Sure.

MR. SILVERGLATE: A-1 is the tape number 3818.

Now, the reel numbers, your Honor, from Mr. Pedowitz's set, not the originials in the vault of the Supreme Court -- the originals have a wholly different set of numbers for some reason, but tape 3818 --

THE COURT: That's the Supreme Court New York County you are talking about?

MR. SILVERGLATE: That's correct, your Honor.

THE COURT: What transcript number?

MR. SILVERGLATE: There is no transcript of these, your Honor. These are some short portions.

THE COURT: All right, 3818, the tape.

MR. SILVERGLATE: Correct.

THE COURT: This is on a telephone?

MR. SILVERGLATE: There is a bug in the room. The bugged tape is dated from 10/25/72 until 11/13/72 and the first portion is a discussion, and perhaps the government can find it from this discription, in which Ostrer indicates that "tomorrow at 2 o'clock he has to go before Judge Edelstein" and he indicates that he has just hired Roy Cohn.

Perhaps, your Honor, some of these small sections, if the government recalls the section and will agree that's what's on it, we can agree on it. Some of it is of limited significance. The significance is that the tape talks about the trial which were not conceivably relevant

to the State government's investigation. That is the purpose of playing this section.

MR. PEDOWITZ: If it is helpful, your Honor, that particular conversation was recorded on November 7, 1972. That's reflected in Detective Finley's plant report.

THE COURT: Thank you.

MR. PEDOWITZ: Your Honor, ams I being asked to stipulated as to what is on that particular section? I certainly will.

THE COURT: They said they wanted to play some anyway.

MR. SILVERGLATE: This is a section of limited relevance, your Honor. If you will stipulate that's what's on it, we can go on.

THE COURT: As I understand it, the stipulation is that on November 2, 1972, the bug overheard Mr. Ostrer telling who?

MR. SILVERGLATE:It is not clear to whom he was talking. Somebody in his office.

THE COURT: That he was going to court at 2 o'clock the following day and that he has just hired Roy Cohn to defend him.

MR. SILVERGLATE: As one of his lawyers, along with Mr. Edelbaum.

of the second tape, the second bugging tape and what I will do, your Honor, is I will hand you up, your Honor, a listing of our tapes with both the re-recording numbers and the original numbers and the designations which we have given to them, A-1 through 8, I believe, and B-1 through 5 and then C-1 through 3.

THE COURT: Do we have a transcript number?

MR. SILVERGLATE: There are some transcripts here. GXT-1, T-2, and T-4 are all from this reel.

MR. PEDOWITZ: Actually, 1, 2, 3 and 4 are all from this reel.

If your Honor wishes, we will try to keep them in context so we can play the government tapes with the transcript as we work through this particular tape. If that's agreeable to Mr. Silverglate I would frankly prefer this system.

THE COURT: Yes.

MR. SILVERGLATE: Yes. If I might describe this first segment.

THE COURT: You are now going to play T-1, the tape representing transcript T-1?

MR. PEDOWITZ: I will know, your Honor, as soon as Mr. Silverglate describes what it is that he wishes to play.

THE COURT: That would have been a great team.

MR. PEDOWITZ: Your Honor, I --

THE COURT: I take it Mr. Cohn didn't accept the retainer?

MR. SILVERGLATE: Apparently not.

MR. PEDOWITZ: I am perfectly willing to stipulate that that is what is on that tape.

THE COURT: So stipulated for this hearing.

MR. SILVERGLATE: Later on on that tape, Mr. November was overheard saying Mr. Edelbaum asked whether it would be best to Mr. Louis Ostrer to take the stand. November says "We are not going to. In that case, it is going to be a very short trial. If he took the stand they would go into his past."

THE COURT: Who's having this discussion now?

MR. SILVERGLATE: This is November speaking.

THE COURT: With whom?

MR. SILVERGLATE: Unclear.

MR. PEDOWITZ: Your Honor, my problem with this is I have no notation that it was in fact Mr. November who was doing the speaking. I have a note in my record that at footage on 957 of the same tape, which was recorded from what I can make of the plant reports, either on November 8th or November 9th, 1972, and I might add that the reason I

cannot tell from the plant reports is that there is no notation in the plant reports about this particular conversation.

THE COURT: Perhaps I ought to hear it.

MR. PEDOWITZ: Fine.

THE COURT: The difficulty with it is we don't know who he is talking about.

MR. SILVERGLATE: However, your Honor, the importance to you is that it is information about the trial and the trial strategy.

THE COURT: Yes, but you see, if he went down in the corner saloon and talked to the bartender about the trial and trial strategy and some FBI man is leaning on the brass rail taking his anodyne for the day, I don't know that that would be any intrusion on anyone's rights.

MR. SILVERGLATE: First of all, your Honor, it is a First Amendment as well as a Fourth Amendment --

THE COURT: I don't care about any amendment, if you go out in the street people can listen.

MR. SILVERGLATE: Secondly, your Honor, this was taped in the office.

THE COURT: Play the tape.

MR. SILVERGLATE: Okay.

MR. PEDOWITZ: Your Honor, each time the tape is replayed it stretches somewhat. Our footage may note be

perfect each time, so you may have to bear with us for a little bit.

THE COURT: That's all right.

(Tape played.)

MR. PEDOWITZ: I did not overhear Mr. November's voice, a voice I have gained some familiarty listening to in these tapes. I hear Mr. Greenfield's voice and I think I hear Mr. Ostrer's voice, but I did not hear Mr. November.

THE COURT: Unless I were to listen to this several times or through earphones, it would be very difficult to make any resolution of exactly all that was said on that tape. I think that I ought to hear while it is fresh in my mind, Mr. Silverglate's representation as to what he contends this particular tape shows and then I would ascertain to what extent you, Mr. Pedowitz, dispute his representation and if it's too difficult I am either going to ask for an earphone to listen to this in chambers at my convenience where I would play it two or three times or else I would ask you to get me a transcript of it.

You know, when these transcripts are made, they usually listen to these tapes in segments and more than once. It is quite an art to make a transcript from a tape like that.

MR. PEDOWITZ: Indeed, your Honor. It took us

many days to prepare the ones which we have prepared for the Court.

THE COURT: Mr. Silverglate, you make a representation as to what you contend the tape just played shows.

MR. SILVERGLATE: There is a statement by somebody, which we thought was Mr. November, which might not have been Mr. November, it might have been somebody else, I thought it was Mr. November's voice.

THE COURT: What was Mr. Greenfield?

MR. SILVERGLATE: Mr. Greenfield is another employee.

THE COURT: But not a member of the Bar?

MR. SILVERGLATE: Not a member of the Bar. Whoever it is that is speaking, is discussing what Mr. Edelbaum -- what Mr. Edelbaum's plans are for the trial with respect to whether Mr. Ostrer would take the stand and whoever it is speaking says that Edelbaum has asked whether it would be best to let Louis Ostrer take the stand.

He then says "We are not going to, in that case it is going to be a short trial. If Ostrer took the stand they would go into his past, why he pleaded guilty." The reference there is to a New York Supreme Court matter.

THE COURT: A felony conviction matter involving moral turpitude is admissible on credibility.

Edelbaum didn't want Ostrer to take the stand in view of that and then the only thing is Ostrer interrupts and says "The trial starts in eight weeks."

THE COURT: Do you accept that representation for purposes of this hearing?

MR. PEDOWITZ: I accept it except I would like to make clear that Me. Edelbaum's voice is not being overheard here and once again, I would like to reiterate our position that none of this information was turned over to the federal government at that time.

THE COURT: You don't have to argue the case. We are just trying to find out what's on this tape for purpose of this record.

MR. PEDOWITZ: I will concede Mr. Silverglate's representation is accurate although I don't hear about Mr. Edelbaum's voice being heard.

MR. SILVERGLATE: It is not important, but whoever it is is discussing Mr. Edelbaum's advice and strategy.

THE COURT: But the defendant's presence is established?

MR. SILVERGLATE: Yes.

MR. PEDOWITZ: And I would like to reiterate again, there is nothing on the plant reports which reflects

this conversation.

THE COURT: Yes.

MR. SILVERGLATE: I would simply point out to your Honor the importance to the defense.

THE COURT: I understand that. You will have a brief at the end of the hearing. Let's go on to the next tape.

MR. SILVERGLATE: On the same tape, the last item, Mr. Ostrer is on the phone. He says he doesn't want to be in a position where a jury is given the impression that a client took checks and destroyed them for fear of prosecution.

Now, I should explain a little of the background

Mr. Ostrer on this tape is making an attempt to receive three certified checks which he had assumed had cleared the bank which were in his view important to the defense on the case because they would have shown that payment was made for a certain stock and a good part of the tape was taken up by Mr. Ostrer on the telephone trying to find out where the checks are and his concern is that if he can't -- that at the trial, if he were going to testify, he could testify that these debts were paid, but if he couldn't prove it with the certified checks, the jury might not believe him, so the conversation is Ostrer on the phone

saying that it would give the jury a very bad impression if the jury thought that he destroyed the checks for fear of prosecution. And Ostrer continues talking on the phone, trying to recover these three checks.

They are called the American Global checks because they were-- American Global which was a brokerage house or something, was involved in the transaction.

THE COURT: He was talking to a bank, was he?

MR. SILVERGLATE: He was talking to the bank trying to go through the labyrinth bureaucracy in the bank trying to locate these checks.

There are many other discussions on other tapes we will get to on that subject, also.

MR. PEDOWTIZ: Your Honor, the footage, if the Court were to listen to this conversation is at 1136 on the tape.

THE COURT: Is it on the plant report?

MR. PEDOWITZ: There are very brief notes about a conversation "Re: Global checks." The date of the plant report and the date this conversation was overheard, was November 10, 1972.

Your Honor, there are a number of things I would like to say about this. First of all, I don't understand how these Global checks fit into the federal trial. I am

not even positive that they relate directly to the federal trial. They may, but I don't know enough about the federal trial to tell whether or not they relate to the case.

Secondly, Mr. Ostrer is representing himself in this particular conversation as being an attorney in talking to this man at the bank, claiming that he is a Mr. Levine of Mr. November's firm.

THE COURT: Is there a Mr. Levine of Mr. November's office?

THE DEFENDANT: Yes, there is. He is an attorney.

THE COURT: Is it essential that I hear it in view of the statement on the record?

MR. SILVERGLATE: No. There will be more explaining the importance of these checks later on in the tapes.

It is not important that you hear this segment, your Honor. Shall we go on?

THE COURT: Yes, please.

MR. SILVERGLATE: That's all for this tape.

The next tape is Government's A-2, which is 3819.

THE COURT: I don't know that I have A-2. All of mine are numbered WT's.

MR. PEDOWITZ: Your Honor, 3819 is the recording

MR. SILVERGLATE: The first segment, your Honor, starts just before where the government transcript begins and this brings us to the first problem with the transcript. There is a mistake in the transcript. The first sentence on GXT-1, the government transcript, has "IF I wanted to go to the D.A., okay, I would have to stand trial."

What Ostrer says is "If I wanted to go to the D.A., okay, I would not have to stand trial."

"I would not," would not. That was heard quite clearly. If we could begin the tape playing a little bit before where your transcript begins, Ostrer mentions that he has a memorandum that somebody just wrote and he talks about the possibility of being acquitted and then he goes into the sentence, "If I wanted to go to the D.A., I would not have to stand trial. Do you know what the D.A. wanted me to do? To frame two people. The D.A. wanted me to say two people told me to buy it, but Hellerman told me to buy it."

MR. PEDOWITZ: Your Honor, I have supplied these transcripts to the defense team I believe last Friday they arrived in the offices of Mr. Silverglate and Mr. Dershowitz. This is the first I'm hearing about any specific changes in the transcript. I wish I had had an opportunity to re-listen to the tapes.

THE COURT: We will hear it now.

MR. PEDOWITZ: Fine.

THE COURT: Is it contended that the D.A. means District Attorney?

MR. SILVERGLATE: Correct.

THE COURT: It doesn't mean United States Attorney?

MR. SILVERGLATE: No, in this case it means United States Attorney.

THE COURT: That's the contention?

MR. SILVERGLATE: Yes.

THE COURT: All right.

MR. SILVERGLATE: They refer frequently to the United States Attorney.

MR. PEDOWITZ: Your Honor, what we are interested in in this particular portion is the indication that Mr. Ostrer is in fact being tapped. Your Honor, I would liketo approach the bench if I may for just a moment on a matter of some delicacy.

THE COURT: Yes.

Mark this last exhibit for identification.

(Government's Exhibit CC was marked for identification)

(At the side bar.)

MR. PEDOWITZ: Your Honor, I had indicated to

both Mr. Dershowitz and Mr. Silverglate that before we played this particular portion I would ask to have the courtroom cleared of any spectators because there is a reference here to Mr. Ostrer's interest in other women.

His wife has been in here periodically and so have his sons. I didn't see any reason to have them present in the courtroom when that particular reference was made.

MR. DERSHOWITZ: Mr. Ostrer indicated he has no concern. There is nothing on that tape which is in any way embarrassing or difficult.

THE COURT: Do any of you know who the additional person is who is in the courtroom?

MR. DERSHOWITZ: Mr. Oster's son who is a law student in Columbia Law School.

THE COURT: I think it is proper, but if the defendant doesn't want the courtroom cleard, I will not do it.

MR. PEDOWITZ: Mr. Silverglate called this to my attention.

MR. SILVERGLATE: Mr. Ostrer this morning said he calls everybody "Honey."

MR. PEDOWITZ: It is not so much the "honey," it is "I like to chase girls" or "broads" I think is the reference, and "fool around."

THE COURT: As long as he doesn't catch them.

MR. SILVERGLATE: That's what he said. It's a lot of talk and his family knows.

THE COURT: I think it is proper for Mr. Pedowitz to do as he has done here, but if there is no application on defendant's behalf I will just go ahead and play it in open court.

(In open court.)

MR. PEDOWITZ: Your Honor, our footage on this particular transcript is 137. It is indicated at the top of the transcript the date of this particular conversation is November 13, 1972. Because Mr. Dershowitz and Mr. Silverglate have indicated that they wished to hear something before this portion of the transcript, we will bring it back to approximately 130 and see if that encompasses all which they wish to have the Court here.

THE COURT: Very well.

(Tape played.)

THE COURT: Again, at this time Mr. Silverglate, I will permit you to make a brief statement as to what you contend the portion of the tape prior to Government's Exhibit T-1 shows. I might say to you that I heard him say "I would not have to stand on trial." I think that part of the transcript has an error.

Go ahead, sir.

MR. SILVERGLATE: It shows, your Honor, simply that once again the monitoring agents had an interest in the discussion about the trial even though that was not one of the subjects the wiretap order was covering.

THE COURT: What do you contend it says before T-1 begins?

MR. SILVERGLATE: Ostrer contended there was a memorandum written. He talks about the possibility about being acquitted. That simply led into the statement, "If I wanted to go to theD.A. I wouldn't have to go and stand on trial."

THE COURT: What did he say about the possibility of being acquitted?

MR. SILVERGLATE: There was a portion that was inaudible. He said "If I am acquitted" and then it became inaudible for a few words, and then he came into the part that was transcribed.

MR. PEDOWITZ: As I pointed out, there is a plant report with respect to this conversation dated November 13, 1972. If I may, your Honor, rather than just recollect what it says ---

THE COURT: All right, hand it to the clerk.

MR. PEDOWITZ: Your Honor, it's been pre-marked as Government's Exhibit J for identification. The second

page, your Honor, has a paper clip on it and that is the portion of the plant report which refers to this particular conversation.

THE COURT: For the record, who was Kilroy?

MR. SILVERGLATE: Kilroy is another employee in the office, your Honor, not a lawyer.

THE COURT: And Artie Cohen?

MR. SILVERGLATE: He is the president of American Global.

THE COURT: Very well. Let's continue.

MR. PEDOWITZ: Your Honor, I think that that particular passage reflects what the officer's interest was in this particular conversation. Also, I think it reflects what our interest is in this particular conversation. It indicates that Mr. Ostrer was concerned at all times about being tapped and bugged.

THE COURT: Go ahead.

MR. SILVERGLATE: The next conversation the defense is interested in is the same conversation the government is interested in, GX-2, where Ostrer begins that he has five weeks to prepare for trial.

MR. PEDOWITZ: Your Honor, our footage on that is indicated on the top of the transcript of the conversation. It is on 263. The date of this particular conversation is

November 15, 1972 as reflected in the plant reports.

Your Honor, again because I prepared a transcript of this particular section, marked the plant report separately as Government's Exhibit K for identification.

THE COURT: Hand it to the clerk, please.

It is received in evidence if it hasn't already been.

(Government's Exhibits J and K were received in evidence.)

MR. SILVERGLATE: I would simply point out that this is a very important tape in this case.

May it please your Honor, would it be all right for Mr. Ostrer to sit at counsel table for him to follow the transcript with us?

THE COURT: Certainly.

MR. SILVERGLATE: This is the section of the tape that the government will be claiming constitutes obstruction of justice.

MR. PEDOWITZ: That is absolutely wrong, your Honor. It is another section of this tape which we claim does not constitute an obstruction of justice, but indicates there may very well be an attempt to obstruct justice. We transcribed this particular section so that everything would be in context for your Honor.

THE COURT: All right, play it.

(Tape played.)

MR. PEDOWITZ: That's the end of the taped conversation, your Honor.

Your Honor, as I was saying, this is not the conversation that we deem to be a discussion of an attempt to obstruct justice, this is a conversation which we felt that we ought to have transcribed for the Court so that the whole matter could be put in context.

MR. SILVERGLATE: I agree, that is not the discussion. I thought we were going to play right through to that part.

This part, your Honor, is I think in disputably discussion of legal strategy and how to handle Moss. There is a lot to indicate that Moss could be helpful --

THE COURT: Which number?

MR. SILVERGLATE: The tape that was just played.

THE COURT: All right.

MR. SILVERGLATE: Most of it is apparently just between Mr. November and Mr. Ostrer.

MR. PEDOWITZ: Your Honor, we are willing to concede that had somebody who knew something about the federal case been listening to this conversation or given a tape of the conversation prior to the trial or during the

the trial, it might have been helpful to the government, but as you know, our position is that none of this was transferred over to the federal government.

THE COURT: You don't need to reiterate that. I am listening to the tapes which I believe is proper for me to do and I want to listen to them as promptly and as expeditiously as I can.

MR. PEDOWITZ: I understand, but I understand you want our view of the significance of the tapes and I am sorry if I continually press that.

THE COURT: It isn't that, but some parts that are not transcribed, it is hard on a single hearing to devine what they are saying and doing.

MR. PEDOWITZ: We made our best efforts to transcribe these tapes, your Honor.

THE COURT: I'm not criticizing anybody. Let's go forward. What's next, Mr. Silverglate?

MR. SILVERGLATE: The next section I have is the rather long conversation concerning Susan Gold's affidavit. I see that the government has a little snippet before that being at footage 1087, that's transcript GXT-4.

MR. PEDOWITZ: No, that follows this conversation. We will go to footage 0434, your Honor.

THE COURT: That's T-3?

MR. SILVERGLATE: So T-3 is next and that is I take it, the conversation that the government claims shows a criminal intent, is that right, Mr. Pedowitz?

MR. PEDOWITZ: That is absolutely correct, and, your Honor, this conversation has been made reference to before. It occurred on November 21, 1972 and that is the date of the plant report.

THE COURT: Let me have the plant report for that day.

MR. PEDOWITZ. Yes, your Honor.

Your Honor, it's been pre-marked as Government's Exhibit L for identification.

MR. SILVERGLATE: I would point out to Your Honor the detail in which the plant report is written on this.

THE COURT: All right, it is received in evidence.

(Government's Exhibit L was received in evidence.)

THE COURT: Go ahead and play it.

(Tape played.)

MR. PEDOWITZ: Your Honor, I just don't want the Court to get lost because it is often difficult to follow this. This is now on page 5 of the transcript.

THE COURT: Yes, I am at page 5. The next is supposed to be "Talk is cheap."

MR. PEDOWITZ: Fine, your Honor.

I just wanted to make sure.

THE COURT: I understand that. If I get lost, I'll let you know.

(Tape continued to be played.)

THE COURT: What's next?

MR. SILVERGLATE: The next section is beginning footage 0434.

MR. PEDOWITZ: I think we just played that.

MR. SILVERGLATE: Excuse me, 1087.

MR. PEDOWITZ: Your Honor, that then would be T-4.

THE COURT: And the date?

MR. PEDOWITZ: The same, 3819.

THE COURT: All right.

MR. SILVERGLATE: May it please your Honor, it is important to bear in mind that a copule of passages on, not this next section being played, but a little bit later, there is a follow-up of the discussion your Honor just heard in which it is made evidence that any plan to communicate anything to Moss was changed and decided not to do it.

In other words, they followed Mr. Edelbaum's

suggested use of the affidavit.

MR. PEDOWITZ: I don't recollect that at all, your Honor.

MR. SILVERGLATE: Your Honor will hear it on the tape.

THE COURT: I will hear it.

MR. SILVERGLATE: I just want to keep everything in context here.

THE COURT: All right.

Who is Seymour?

MR. PEDOWITZ: Seymour is Seymour Greenfield, your Honor. I'm sorry, did we refer to him as Seymour in 1087?

THE COURT: T-4, yes.

In the text, yes, Seymour Greenfield. And Henry Brown?

MR. SILVERGLATE: A friend of Ostrer's.

THE COURT: All right, let's go forward.

MR. PEDOWITZ: He was also a subject of the investigation by the District Attorney's office. Both Greenfield and Brown were. Brown was eventually arrested and indicted.

MR. SILVERGLATE: And acquitted.

MR. PEDOWITZ: No, the indictment was dismissed

because of the illegality of the tapes. He was not acquitted.

THE COURT: Let's go forward, gentlemen.

MR. PEDOWITZ: Your Honor, before this begins, to put this in time context, the plant report on this is dated November 24, 1972. Both Finley and McGuire were on the plant. I'm sorry, should I give you the plant report, too, your Honor?

THE COURT: Yes, certainly. Offer it in evidence.

MR. PEDOWITZ: This, your Honor, is Government's Exhibit N.

(Government's Exhibit N was received in evidence.)

(Tape played.)

MR. PEDOWITZ: That's it, your Honor. It is not a very clear tape, your Honor. The significance of it from the government's point of view was Mr. Ostrer's concern that Moss, when contacted, would have a tape recorder on his person or in his car when speaking to Mr. Greenfield.

THE COURT: I don't perceive any particular importance to that.

MR. PEDOWITZ: Your Honor, the significance of it, from our point, is that there is a conversation between Moss and Mr. Ostrer which Mr. Ostrer indicates that the last thing he wants to do is suppress evidence in this

particular case. There was a phone call initiated by Mr. Moss. We expect it will be relied upon by the defense to show that Mr. Ostrer and Mr. November had no intent whatsoever to influence Mr. Moss in any way. We think it is significant that Mr. Ostrer was always concerned that Mr. Moss was wired and therefore the last thing that he would want to do would be to communicate anything to Mr. Moss at a time when Mr. Moss might be wired that might result in an obstruction of justice charge.

THE COURT: All right.

MR. SILVERGLATE: If that shows anything, your Honor, from a defense point of view, it shows that nobody ever got to Aubrey Moss because Aubrey Moss was not only not trusted, but they suspected that he was constantly wired.

THE COURT: Let's hear the tapes. You can all argue at the close of the case.

MR. SILVERGLATE: The next tape is A-3, which is tape number 3632, which is a bug that began on 11/24/72 and closed on 12/5/72. The first conversation on there is a conversation where Ostrer says that he does not want to get involved in suppression of evidence. He talks about Moss' grand jury testimony, what he thought Moss testified to.

Ostrer recalls that he told Moss "You have a civic duty, do it."

Ostrer advises Moss to talk to the U.S. Attorney. He says -- Ostrer says that Ostrer will not give Moss any money, which money Moss wanted, in exchange for any testimony. He admits -- Moss wanted money, but he won't give it to him.

THE COURT: Is there a transcript of this particular one?

MR. SILVERGLATE: No. This is a short section of tape. I'm trying to describe it.

MR. PEDOWITZ: Your Honor, I think this is a bug of a taped conversation which we have both sides of in a tape. I think it would be more permanent to play both sides in a later tape.

THE COURT: Is that tape transcribed?

MR. ANGUILLA: Yes.

MR. PEDOWITZ: No, your Honor. We don't have a transcript of the Moss-Ostrer conversation but it is a very clear one and I think you will be able to pick it up.

MR. SILVERGLATE: May I explain why the bug is as important as the tape?

THE COURT: All right.

MR. SILVERGLATE: There is just before that,

there is a Susan Gold-Aubrey Moss conversation.

THE COURT: Is that transcribed?

MR. SILVERGLATE: The conversation is transcribed. The conversation of the phone conversation, that tape is transcribed.

THE COURT: Which number?

MR. PEDOWITZ: That's Government's T-6.

THE COURT: And now you want the bug immediately prior to T-6, is that what we are talking about now?

MR. SILVERGLATE: We are talking about the but of the same conversation that T-6 is the transcription of.

THE COURT: I would prefer not to listen to that, but if there is something on the bug immediately before or after T-6 --

MR. SILVERGLATE: There is, your Honor, but what is perceptible on the bug tape but not on the phone tap is Louis Ostrer in the background yelling at Susan Gold -- "Hang up on him. Don't talk to him." And various other curse words.

We think that is very important. He is instructing Susan not to talk to Moss.

MR. PEDOWITZ: Your Honor, I dispute the importance of it, but I believe I recollect hearing that and I will certainly be willing to concede that toward the end of

the conversation, of the phone conversation between Aubrey Moss and Susan Gold, Louis Ostrer is yelling something in the background about hanging up and not talking to him.

THE COURT: Can you pinpoint that at a place on T-6 where it fits in?

MR. PEDOWITZ: It is some where -- excuse me, your Honor, it would come at the end of T-6, at the point where Susan Gold is indicating that Mr. Ostrer has now returned to the office or people are now in the office and she wants to hang up on him; Mr. Ostrer in in the background, I believe, is saying something like "Hang up, don't talk to him."

MR. SILVERGLATE: If the government will concede that's what's happening, fine.

THE COURT: But will you give me the page and line on T-6 where that occurred? That would be helpful.

MR. PEDOWITZ: I don't believe it is audible on the phone conversation, your Honor.

THE COURT: I don't understand that. But by fitting the two together you can tell when it happened, can't you?

MR. PEDOWITZ: I can certainly give you an approximation.

MR. SILVERGLATE: I can play the precise portion

on my tape. I know exactly where it is.

THE COURT: This is a page which is the next to the last page of T-6, where it says "They just walked in now."

MR. PEDOWITZ: That would be approximately the point.

THE COURT: That is Ms. Gold speaking. If you want to play that precise part I think perhaps you could do that. I will mark T-6 to show where it is.

MR. SILVERGLATE: Can we play the conversation--towards the end of the Susan Gold-Moss conversation.

MR. PEDOWITZ: It will be difficult for you to find it, your Honor.

THE COURT: You said you had it, Mr. Silverglate.

MR. SILVERGLATE: I have it on mine, but on that machine --

THE COURT: Why don't you play yours and see if that will help. If you can put your finger right on it, play it, and I will undertake to mark T-6 as to where this portion is found. It must be the next to the last page of the transcript.

MR. DERSHOWITZ: Maybe it would expedite matters if the government would play the next part it has while Mr. Silverglate is looking at the tape and then at the end we

rglt

can precisely locate this ten seconds of tape.

THE COURT: I would listen to the telephone tape on the Gold-Moss conversation, but it would be helpful in listening to it to hear first and to locate on T-6 the point where Mr. Ostrer is supposedly telling Ms. Gold not to talk to Moss.

MR. PEDOWITZ: Your Honor, if it is of any help, this conversation takes place on November 30, 1972.

MR. SILVERGLATE: Here it is. Louis Ostrer walked in, your Honor, he asked whose on the phone and Susan Gold says "Aubrey Moss" and then Louis Ostrer instructs her to hang up.

THE COURT: What page of the transcript?

MR. SILVERGLATE: "Don't make me a liar." I believe that's page -- are these pages numbered?

MR. PEDOWITZ: It will be the third to the last page, I think, you are referring to.

MR. SILVERGLATE: The third to the last page.

MR. PEDOWITZ: It should be somewhere on there.

(Tape played.)

MR. SILVERGLATE: That's it, your Honor. That fits in as I read it on the top of the next to the last page of T-6. I will just run it back very quickly.

MR. DERSHOWITZ: Was your Honor able to hear the

the words of Mr. Ostrer?

THE COURT: I did not hear his precise words. I was looking in the transcript trying to find her words.

MR. SILVERGLATE: She says at the bottom of the third page:

"Hold on a minute, hold on, hold on, hold on," and then Ostrer gives her instructions.

THE COURT: Why don't you state Mr. Ostrer's words for the record? It would make it easier.

MR. SILVERGLATE: I will have to hear it again myself.

(Tape played.)

MR. SILVERGLATE: "Fuck him, hang up on him and let's forget about it."

THE COURT: Where would that be inserted in the sequence of the next to the last page?

MR. SILVERGLATE: At the bottom of the third to the last page she puts him on hold. This conversation on the bug takes place while Moss is on hold. It then resumes when she pushes the button and continues the conversation with "Listen, I have nothing." That's the top of the next to the last page.

THE COURT: So the record should show that at that point Mr. Ostrer walked in and asked Ms. Gold who was

on the telephone and she responded "Moss"?

MR. DERSHOWITZ: What happened precisely as I hear it, your Honor, is this:

Some people walk into the office. Susan Gold is on a conversation with Moss and she says "Will you guys get out of the office? I'm in a conversation."

Ostrer says "Who are you talking to?"

She says, "Moss," at which point he says "Fuck him. Hang up on him. Let's forget about it."

That I think is the accurate context of the conversation.

MR. PEDOWITZ: I think that's accurate, your honor.

THE COURT: Okay.

MR. PEDOWITZ: Your Honor, since we have now reached a point where we are discussing the Moss-Gold conversation of November 30th, it seems to me that this would probably be an appropriate time to play the full conversation.

THE COURT: You are going to play T-6?

MR. PEDOWITZ: That's right, and that is tape 3646 at our footage 1139.

MR. SILVERGLATE: Which tape are we playing? 3646?

MR. PEDOWITZ: Yes.

MR. DERSHOWITZ: By the way, the relevance of the insertion, is to indicate that Mr. Ostrer did not instruct Susan Gold to make this phone call and indeed did not even know Susan Gold was making this phone call.

THE COURT: Let him play the tape.

MR. SILVERGLATE: Is this B-2 on your label, Mr. Pedowitz?

MR. PEDOWITZ: That's correct.

MR. SILVERGLATE: Can we date T-6 now?

THE COURT: Yes.

MR. PEDOWITZ: November 30, 1972.

THE COURT: Go ahead, sir.

MR. SILVERGLATE: This is the conversation which I referred to before, which I consider a continuation of that November-Ostrer conversation about how to use the affidavit.

THE COURT: As I understand it, this is the phone call between Miss Gold and Mr. Moss.

MR. SILVERGLATE: That's correct.

THE COURT: All right, go ahead and play it.

MR. PEDOWITZ: Your Honor, I don't quite see how this could possible be an extension --

THE COURT: I don't either, but I am going to

listen to it and then we will take our luncheon recess.

MR. PEDOWITZ: It is nine days later.

MR. SILVERGLATE: And it is prior to the time Mr. Fine talked to Mr. McGuire.

THE COURT: Yes, the Court knows that.

MR. DERSHOWITZ: Your Honor, can we determine what the government contends to play now and how much of it because what we would like to do is play the telephone conversation and then the later material that follows it all in sequence because we think they are in part generally of the same res gestae.

THE COURT: I can't be concerned too much about the sequence in which it is played. My intention was to play what's shown on T-6 and then take a luncheon recess.

MR. SILVERGLAZE: There is other material on the tape that we will want to have played, some of it before T-6 and some after, but all on the same tape.

THE COURT: Suppose we play T-6 and anything that you want to play we will play and I will hear it when I can.

If you will give him the footage prior to T-6 perhaps he will start at the footage.

MR. SILVERGLATE: T-6 is the conversation between Susan Gold and Aubrey Moss.

MR. PEDOWITZ: I think the next conversation follows his, your Honor. It is after this footage.

THE COURT: You give the Court and your adversary the footage on tape 3646 which you now want to have heard.

MR. PEDOWITZ: It is at 1139, your Honor.

THE COURT: No, I want to know what Mr. Silverglate wants if it is prior to 1139.

MR. SILVERGLATE: Yes, two conversations prior. The one immediately prior is Susan tells Ostrer on the phone that Moss has been calling her. Ostrer says she should tell Moss that she doesn't want to meet with him and then she tells Ostrer to call Edelbaum. That's a very short conversation.

THE COURT: What is the footage?

MR. SILVERGLATE: My footage is meaningless on that machine,but it is immediately preceing the conversation at T-6.

THE COURT: Suppose I take that after the luncheon recess and I will resume with all of you at 1 o'clock. Perhaps before you leave, you would attempt to locate it on the tape.

MR. PEDOWITZ: I have a notation of the footage for that conversation.

THE COURT: Fine. We will play it all starting at 1 o'clock.

MR. PEDOWITZ: Fine, your Honor.

Would it be possible to leave this material here rather than dismantling it?

THE COURT: You can, but push it aside. I have one other matter in the interim. Put it in an orderly pile so it won't interfere with the other matter. We will take a very brief recess.

(Luncheon recess.)

AFTERNOON SESSION

1:15 p.m.

(Hearing resumed.)

MR. PEDOWITZ: Mr. Silverglate has been kind enough to have the Court turn its attention to T-7. The reason we are doing that, your Honor, is that in terms of time this particular transcript precedes the one which we were going to focus in on on 3646. This particular tape is 3645. It has been numbered C-1 and the footage is on 665 and it is all set to play, your Honor.

THE COURT: What is the date of this?

MR. PEDOWITZ: Your Honor, I am handing up to you an exhibit marked Government's Exhibit M, which is the plant report for this particular transcript. The date is November 27, 1972.

(Government's Exhibit M was received in evidence.)

THE COURT: Go ahead, sir.

(Tape played.)

MR. PEDOWITZ: Your Honor, the significance of this is twofold.

First of all, we have Mr. Ostrer once again commenting to Susan Gold that he is concerned that he will be wired and she ought not to talk to him for that reason.

Secondly, there is an indication in there that Susan Gold's paycheck six days after the conversation between Mr. November and Mr. Ostrer about the woman wanting an increase in pay is suddenly increased.

While there is a denial by Mr. Greenfield, who is the Seymour of this conversation we believe, that it is Mr. Ostrer who is ordering the increase in pay, we note: that Mr. Ostrer -- Susan Gold was working for Frings, that Mr. November was the president of that corporation and in addition, Seymour Greenfiled is a very close associate of Mr. Ostrer.

MR. SILVERGLATE: From the defense point of view, your Honor, this is an important conversation for several reasons.

First of all, it shows once again that the people in the Ostrer office, including Mr. Ostrer, believed that Mr. Moss was wired or recording everything that was going on which he was involved with.

Secondly, we note that the raise that Susan Gold got was from $104 a week to $110 a week and it was Seymour Greenfield who ordered the extra $6 a week to be added on to her paycheck.

Finally, and most important, at the beginning of the conversation where Susan Gold indicates that she told

Moss not to call her and --

THE COURT: I certainly heard that.

MR. SILVERGLATE: Okay. Those are the important things, your Honor.

THE COURT: Very well, let's play the next one.

MR. PEDOWITZ: Fine, your Honor.

We would only ask the Court to take judicial notice of the fact that an increase in net pay does not reflect the full increase in the gross pay. There was a reference to $10 on the November-Ostrer tape and we believe that a $6 increase, approximately, would reflect the $10 increase.

THE COURT: I don't want to delay my hearing getting in an argument with anybody. I have to look at the whole picture when the entire record is before me.

As you know, even if she was in the 50 percent tax bracket, which I doubt she is, I don't know that you procure much perjury in this day and age for $12 a week.

The other problem is that I don't understand either side in this hearing to contend that Miss Gold's affidavit is untruthful. Is that right?

The demand made for money was that she wanted to be paid because she was humiliated and bothered by having to sign it and being asked to sign it. That's the

the most you can read it to it.

MR. PEDOWITZ: I agree with the first statement, your Honor, that there is no contest here that the affidavit is in fact truthful.

The second item, I think that a reasonable person might construe the payment as being for the affidavit. Whether or not it is for the trouble and bother involved or the mental anguish involved or whether it is --

THE COURT: I will have to look at the entire picture. I don't think you can bribe very many people for $12 a week in this day and age. They do say that she was complaining for a long time about her salary. All right.

MR. SILVERGLATE: Perhaps we could call Moss here as a court witness.

THE COURT: Who?

MR. SILVERGLATE: I was saying the goverment could always call Moss as a witness on that if they want. That's the same problem they faced at trial, who would call Moss

THE COURT: You know, the Federal Rules of Evidence say that nobody vouches for a witness by calling him.

MR. SILVERGLATE: Technically -- under the New Rules that's true.

THE COURT: That's right.

MR. SILVERGLATE: It is still a question of who puts him before the jury.

THE COURT: I can assume Susan Gold's affidavit is correct here. It is not otherwise contended.

MR. DERSHOWITZ: No, it is not.

MR. SILVERGLATE: Correct.

Now, going back to 3646.

MR. PEDOWITZ: The first conversation Mr. Silverglate has asked me to play is a conversation between Mr. Ostrer and I believe a Mr. McCann. It is at our footage 1013. The date of the conversation is 1/22/72.

MR. SILVERGLATE: Your Honor, there is no transcript of the first two segments, so I just should give your Honor a little background in what goes on in this segment.

THE COURT: Is there a transcript of any part of it and if so, what number is it?

MR. SILVERGLATE: There is a transcript where Susan Gold is on the phone with Moss and that is T-6, your Honor, but before that we have first of all Ostrer on the phone with Mr. McCann. Ostrer says he has the Belmont trial coming up "Where I got taken for $123,000." Ostrer tells McCann that Moss put up 30,000 and he got back the preponderance of his money and what he didn't get back he took as

a tax loss.

Then Ostrer says about Moss to McCann Moss has got such a sadistic type of outlook on things. He is obsessed.

I never gave him a tumble on those policies, referring to policies Moss cancelled which he carried with Ostrer. He is obsessed to ruin my image. He went to the U.S. Attorney and probably told him I didn't pay him for the stock, yet he returned the collateral to me and there is more to it than arithmetic.

Oster says that he didn't want to talk to Moss because he didn't want anyone to think that he was impeding justice. He says besides, Moss is a cuckoo.

THE COURT: Go ahead.

MR. SILVERGLATE: Then the following conversation is Susan tells Ostrer on the phone that Moss has been calling here. Ostrer says she should tell Moss he doesn't want to meet with him and then Susan says "By the way, Lou, call Edelbaum."

That's the end of that and then we go into the transcript.

THE COURT: Is it necessary for me to hear that if the government would concede for purposes of this hearing that Mr. Silverglate states it fairly?

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MR. PEDOWITZ: He states the first conversation fairly, your Honor.

The second conversation, however, I would like to point out occurred seve- days later.

THE COURT: The second conversation being which one?

MR. PEDOWITZ: The one between Susan and Ostrer.

THE COURT: Where she tells him the attorney called?

MR. PEDOWITZ: That's right, your Honor.

THE COURT: Do you agree with that?

:MR. SILVERGLATE: The timing on that?

MR. PEDOWITZ: Yes.

MR. SILVERGLATE: Certainly.

THE COURT: Then I don't think you need to play that particular one. I don't think I gained anymore from the sound of it than I would being told what was said.

MR. SILVERGLATE: Your Honor, for your edification, Mr. McCann is the president of the Foundation Life Insurance Company.

THE COURT: That is a company represented by Frings?

MR. SILVERGLATE: Frings sells policies written by that company.

THE COURT: What was the connection of Moss, if any, with Fringe?

MR. SILVERGLATE: Moss has a $5,000,000 life insurance policy through Fringe.

THE COURT: On Moss' life?

MR. SILVERGLATE: On Moss' life and he cancelled that policy shortly before this time.

THE COURT: Payable to whom, the $5,000,000?

MR. SILVERGLATE: His estate or his beneficiary.

THE COURT: What is Moss' occupation?

MR. SILVERGLATE: He was involved in a metals business in New Jersey as an executive. It was, either he or his wife actually owned the company.

THE COURT: You mean a smelting company or somethin like that?

MR. SILVERGLATE: He dealt in sheet aluminum and copper.

THE COURT: I sounds like he might have been worth more dead than alive. Let's go forward.

Now, play the tape represented by number 3646. Beginning at 1139.

(Tape played.)

MR. SILVERGLATE: If it please your Honor, the importance of that tape is first of all it shows that Susan

Gold was in possession of prior statements that Mr. Moss had made to her which would be presumably inconsistent to what he was now saying appeared what he would presumably testify if he took the stand and of course whoever heard those tapes learned that.

Secondly, I think it is fairly evidence from the context, if not obvious from the context, that she had not and nobody at that point had communication to Mr. Moss that Susan Gold was a potential witness or communicated the existence of the affidavit.

MR. PEDOWITZ: Your Honor, it is significant from the government's point of view and from the viewpoint of the state prosecutor looking at these conversations, first of all that this conversation occurs some two or three days after Mr. Ostrer has told her not to speak to him because he might be wired.

THE COURT: Am I absolutely certain of the date of this conversation?

MR. PEDOWITZ: It is November 30, 1972, your Honor.

THE COURT: Fine.

MR. PEDOWITZ: It also, we believe, shows the amount of pressure which this woman was capable of putting on this man. This man obviously had a relationship with

this woman, one which he hoped would persevere.

THE COURT: You know, I am running out of time here. While I have to say it is interesting, I would like to hear all of the tapes today and close the evidentiary hearing.

MR. PEDOWITZ: We are almost through.

THE COURT: These arguments that you have in mind you can even make at the end of the day or in your briefs.

MR. PEDOWITZ: Certainly.

MR. SILVERGLATE: Isn't there an Ostrer-Moss conversation?

MR. PEDOWITZ: Yes, I think this may run right into this.

MR. SILVERGLATE: Yes, it does. There is an Ostrer-Moss conversation.

THE COURT: Is there a transcript of that?

MR. PEDOWITZ: No, the defense did not prepare one.

MR. SILVERGLATE: This is a summary and it is relatively simple.

This is a conversation between Ostrer and Moss. Ostrer says thathe doesn't want to suppress any evidence. Moss says he will be yanked in at the Ostrer trial and he

will be the only one. That's the only one of the investors.

Ostrer points out that Moss already testified before the grand jury. Moss says he was asked to come, he was not subpoenaed.

Ostrer says Edelbaum can't do anything and Moss should take it up with the U.S. Attorney. Moss says Ostrer owes money,but Ostrer says he can't pay Moss for his testimony.

Moss is also worried about the notoriety of being a witness. Ostrer says "We have been waiting for a bill of particulars and when we get it we don't intend to suppress anyone."

Ostrer wants to know why Moss wants to meet with Edelbaum. Moss says that maybe Edelbaum can advise on "the whole relationship."

Ostrer says he will not meet with Edelbaum and Moss. Ostrer says that even if he intended to pay Moss anymore money, he certainly would not pay it to him under these circumstances.

Moss wants to get together with Ostrer to go over accounts. Ostrer says he has got an investigator named Jim Lynch who will see Moss if Moss is on the government's list of witnesses.

Ostrer says that Edelbaum goes on vacation in two

weeks and he will remain on vacation until the trial date.

Ostrer reminds Moss that he needs at the trial some papers Moss has and if Moss doesn't voluntarily give them to Oster, Ostrer will have to subpoena the papers.

MR. PEDOWITZ: Your Honor, from my recollection of the conversation, that is a fair presentation of what is on that particular tape.

We once again reiterate, and I do this very briefly so as to not unduly delay the Court, that Ostrer has at this point three or four times expressed concern that Mr. Moss might be wired. In addition, this phone conversation is initiated by Mr. Moss and, finally, we point out that there is a reference here to a Mr. Lynch.

If there is any claim by the defense that this was a secret weapon that was being withheld from the U.S. Attorney's office or from anyone else, it is instructive I think to note that Mr. Moss, who Mr. Ostrer thought was cooperating with the U.S. Attorney, was being advised that Mr. Ostrer had a Mr. Lynch working for him.

THE COURT: All right, you can play it.

MR. PEDOWITZ: Your Honor, do you wish to hear it?

THE COURT: I would like to hear at least part of it.

MR. PEDOWITZ: Fine.

(Tape played.)

MR. PEDOWITZ: I think that does it for that particular tape.

MR. SILVERGLATE: It does. I have nothing on A-4, Mr. Pedowitz. Do you? That's tape 3633.

MR. PEDOWITZ: No.

MR. SILVERGLATE: On tape A-5 , which is 3618, there is a brief conversation which perhaps Mr. Pedowitz will stipulate to. It is a conversation between Ostrer and a man named Jerry DiLorenzo. Ostrer indicates there that he wanted a non-jury trial, but unfortunately co-defendant Dioguardi wants a jury trial.

The relevance of that, your Honor, is that Ostrer in this case wanted, as the tape indicates, to take the stand, but he wanted to do so in a jury waived trial.

In fact, Ostrer requested jury waived, but the co-defendant insisted on a jury.

THE COURT: What's the date of this?

MR. SILVERGLATE: The tape on which this appears runs from 12/4/ until 12/22/72. It is within the period before the critical meeting between the prosecutors.

THE COURT: Who was Mr. DiLorenzo?

MF. SILVERGLATE: A friend of Ostrer's.

MR. PEDOWITZ: I have another characterization for him, but I don't think it is necessary.

THE COURT: But you do stipulate that that's what the tape shows?

MR. PEDOWITZ: I do stipulate, your Honor, that that is a very, very small portion of a very long conversation which has overtones which I don't think is necessary to get into.

THE COURT: Is this person named either a purported co-conspirator or a witness in this case?

MR. PEDOWITZ: He is Hickey DiLorenzo's brother. I don't believe he was a co-conspirator in this case.

MR. SILVERGLATE: It is the brother of somebody that the government doesn't like. There is no corruption of blood.

THE COURT: What I wanted to make clear is whether his name appears anywhere in the record in this trial.

MR. PEDOWITZ: I don't believe so.

MR. SILVERGLATE: No.

THE COURT: All right.

MR. PEDOWITZ: Your Honor, I will agree with counsel that that is indeed a very small portion of t t

conversation; that the conversation took place precisely on 12/20/72 and that's about it.

THE COURT: All right.

MR. PEDOWITZ: Counsel has made reference to 3616.

MR. SILVERGLATE: 3816.

MR. PEDOWITZ: That's the correct number of this particular tape, 3816.

MR. SILVERGLATE: There is no need to play that one, then.

THE COURT: All right.

MR. SILVERGLATE: The next tape is A-6, tape number 3821. Now, I think we probably don't have to play this, your Honor. I will explain the significance.

There was a lot of discussion here about the trial. The trial begins on this tape. The tape covers from December 22nd of 1972 until January 29, 1973.

Each of the events here come after the crucial meeting between the prosecutors. The only reason I think it is interesting is it shows that the people making these tapes have a continuing interest in this federal case, in the federal trial, none of which has the slightest bit to do with the investigation that the wiretap order refers to.

I can summarize very briefly the conversations I think rather fairly and I don't think we will have to play

the tape.

THE COURT: I will let you summarize the conversation, but wasn't the wiretap order extended after the 22nd?

MR. PEDOWITZ: It certainly was, your Honor, and indeed mixed within these conversations which counsel says involves trial strategy are conversation which would have been most interesting to the state authorities in their investigation of the usurious loan conspiracy which they were investigating.

MR. SILVERGLATE: If I will summarize the conversations it is obvious that they are strictly --

THE COURT: You know what I'm going to do, then, I am going to mark all these tapes in evidence.

MR. SILVERGLATE: They should be.

THE COURT: Which have been summarized and stipulated to and if when I get your post=trial memoranda I feel required to play them, I will play them to myself in camera and you may consider that the Court has either heard or will hear anything that's markedinto evidence here.

MR. SILVERGLATE: That's fine.

THE COURT: But if it can be saved playing in this courtroom, then it would be helpful to me.

MR. SILVERGLATE: All right, I will summarize

the portions.

This is a bug, your Honor, not a telephone tap. Ostrer says that he doesn't have to prove his innocence, the government has to prove his guilt.

Edelbaum is not feeling okay. There was a conference in chambers. McGuire says that we should try the case on Saturdays. The Judge said he is incline to agree to try on Saturdays.

Ostrer is on the phone with Edelbaum and he says that if Edelbaum wants to try on Saturday it is against Ostrer's better judgment. This is the period when Mr. Edelbaum is getting a heart seizure.

MR. PEDOWITZ: His counsel representing that this is a conversation with Mr. Edelbaum?

MR. SILVERGLATE: It sounded to me like he was talking to Edelbaum. He says if he goes to trial. I believe it was Edelbaum. I am almost positive. He says if you go to trial on Saturday it is against my better judgment because Edelbaum just had a heart seizure.

Do you have doubt that it was with Edelbaum?

MR. PEDOWITZ: Yes.

THE COURT: While Mr. Edelbaum has an unmistakable voice in court, I'm not sure I could identify him on any tape.

MR. DERSHOWITZ: I'm not sure the representation is that Edelbaum's voice is on the tape. This is a bug. The representation is that Ostrer is talking to Edelbaum on the phone and one hears Ostrer's side of an Ostrer-Edelbaum conversation.

THE COURT: As to which there is no tape.

MR. DERSHOWITZ: As to which there is no tape or recorded tape and Ostrer is saying to Edelbaum, "Look, it is your health, and as far as I'm concerned, my advice to you is we shouldn't go ahead if you're not feeling well."

It is not a critical conversation substantively.

THE COURT: I will take it as so indicated.

MR. PEDOWITZ: I think counsel agrees that this tape was made after the date of any conversations that Mr. McGuire had with Mr. Fine.

MR. SILVERGLATE: After the date of the meeting that's been testified to.

Later on in the tape Ostrer talks about who is going to take the stand and Ostrer says Hellerman will take the stand. I just point out that that's the witness Mr. McGuire said was the big secret surprise.

Later on on the tape, Ostrer says the whole thing started when Hellerman told Morvillo that the only way to get him was through me. Ostrer discussed who was going

to the trial, who had pleaded guilty earlier.

THE COURT: Hellerman told Morvillo what?

MR. SILVERGLATE: The whole thing started, Ostrer says, when Hellerman told Morvillo that the only way to get him was through me, meaning through Ostrer.

THE COURT: The only way to get whom?

MR. SILVERGLATE: That's not clear. Dioguardi? Probably Dioguardi.

The context sounds like it is Dioguardi.

Finally, the last conversation, Ostrer goes into great deal in explaining the deal that Hellerman made with the federal government. He discusses the first deal that Hellerman made in the so-called Imperial case. He then told the government that he would tell all, but he would not take the stand, but he would commit no more crimes.

Then Hellerman committed another crime and the government nailed him. Morvillo came in and said to Hellerman that the government would prosecute Hellerman unless this time Hellerman went all the way.

Broderick, who was Hellerman's lawyer, asked for a written agreement. Dioguardi's lawyer discovered this written agreement. Ostrer then discussess probable sentences in the event of convictions and he says "One thing I don't want is to be dragged down with Johnny." That's Johnny

Dioguardi.

That's all the material on this tape that's of importance.

THE COURT: All right.

MR. PEDOWITZ: Of some interest to the Court may be that there are, I believe, no plant reports of these particular conversations. I think that's conceded by the defense.

THE COURT: How much longer will you be, because I have another matter I have to take out of order?

MR. SILVERGLATE: Just a couple of minutes.

THE COURT: All right, you may continue then.

MR. SILVERGLATE: Tape 3822, Mr. Pedowitz, I have nothing, do you?

MR. PEDOWITZ: Unless I have a transcript, I have no intention of playing anything.

MR. SILVERGLATE: 3824, nothing.

3817, I have nothing.

Tape numbered 3815, your Honor, which is Government's B-3, which began on December 1st and ended on January 10th, it is a tap. There is a discussion where Seymour Greenfield and Julius November are talking. Greenfield says that Greenfield told Moss that November told Greenfield to stay away from Moss now.

Ostrer wants some documents of transactions he assumed to be at Edelbaum's office and later on Ostrer tells Kilroy to tell November that November should not talk to Moss.

So once again, Ostrer's instructions are to keep away from Moss, don't talk to him and don't get involved with him and that's all I have on that, Mr. Pedowitz. That is it, your Honor, on that one.

THE COURT: All right.

Is there anything else?

MR. PEDOWITZ: May I have a moment to look through my notes?

THE COURT: Yes, but I want to establish whether Mr. Silverglate or Mr. Dershowitz want to include in the record at this hearing.

MR. SILVERGLATE: Would your Honor prefer to take something out of order and have us finish after that?

THE COURT: Yes, I would. I just wanted to find out, will you tell me what you have, at least as to the time and preferably as to content.

MR. SILVERGLATE: There is one that we will have to say. I would say we have got fifteen minutes, your Honor

THE COURT: All right, we will have about a fifteen minute recess as to you gentlemen. You may leave

your papers here and if you want to use the jury room, you can if it is convenient or go out in the hall.

All right.

(Recess.)

THE COURT: All right, we will resume, gentlemen.

MR. SILVERGLATE: Continuing on the tapes, your Honor, tape number 3823, also labled B-4. There is a conversation between Ostrer and Jerry DiLorenzo. Ostrer says he has to see Edelbaum because he has got to be on again.

THE COURT: He has what?

MR. SILVERGLATE: He has to to see Edelbaum because he has got to be on again. I don't know what that means.

Ostrer then says "I'm taking the stand Monday" and DiLorenzo says, "Yeah, that's what you have got to decide now."

Later on Greenfield is speaking to a male --

MR. PEDOWITZ: Your Honor, can we break at each individual conversation?

THE COURT: Yes, sure.

MR. PEDOWITZ: I will agree that that is in fact a synopsis of that conversation. I would like to point out the Court, however, as the record will reflect,

that Mr. Ostrer did not in fact take the stand at this trial.

THE COURT: That I already know. What is the date of this conversation?

MR. PEDOWITZ: Your Honor, I made a question mark because it was not entirely clear what date it was intercepted. It is clear there are no plant notes on this, but my guess was January 11, 1973.

MR. SILVERGLATE: The tape began January 10th.

MR. PEDOWITZ: I'm sorry, your Honor, I also want to point out you had asked whether DiLorenzo was a subject of this indictment. I may have misunderstood you.

Jerry DiLorenzo was a subject of the State investigation, he was clearly named in the wiretap and bugging order.

THE COURT: What I asked was whether in the bill of particulars he had been listed as a co-conspirator. That is what I had in mind.

MR. PEDOWITZ: Not in the federal trial, certainly.

THE COURT: Go ahead, Mr. Silverglate.

MR. SILVERGLATE: Later on in the tape there is a conversation between Seymore Greenfield and an unidentified male. Greenfield complains about having to pay Jim Lynch

250 or 300 dollars a day and Lynch hasn't even done anything yet.

The remainder of that tape -- on the remainder of that tape, it is noted from time to time that the jury is still out. By the end of the tape, which is three and a half days of jury deliberation, the jury has come in with a conviction.

I would only point that out, your Honor.

MR. PEDOWITZ: My notes reflect, your Honor, that there was a conversation on January 23, 1973, between Ostrer and Greenfield in which Ostrer indicated that the Judge had just finished his charge and that the jury was going out soon and Mr. Ostrer said that it could go either way with the jury. If that's the conversation --

MR. SILVERGLATE: Yes.

MR. PEDOWITZ: You refer to "we agree" that it is there.

MR. SILVERGLATE: I only point out, your Honor, the wiretap was very interested in this trial.

THE COURT: You see, by that particular interception both sides had rested, had they not?

MR. SILVERGLATE: Yes. I'm not saying there was any communication from this tape, there couldn't be.

THE COURT: There couldn't possibly be because

everything was over except waiting for the verdict.

MR. SILVERGLATE: I am only pointing out there was a continuing interest in the State authorities in this trial.

THE COURT: But they didn't put this on the plant notes.

MR. PEDOWITZ: No, there are no plant notes on that conversation, your Honor, and once again, I would like to reiterate that many of these snippets of conversations about the trial are placed in other conversations which relate to other financial matters, checks, business deals and so on, which the State was very interested in intercepting.

THE COURT: I think we don't have to go over it again, but the people making the inercept at that time believe that they were making a lawful intercept pursuant to a court order.

MR. SILVERGLATE: But the subject of the trial was never encompassed within the order or the amended order.

THE COURT: Didn't he get an amendment to the order after the 22nd?

MR. SILVERGLATE: Yes.

Simply to add November onto the list of people that they could target on.

THE COURT: As a potential target for joining in some coercion of some sort?

MR. SILVERGLATE: Yes, that's correct.

THE COURT: Of a witness in this case?

MR. PEDOWITZ: Correct.

MR. SILVERGLATE: Correct.

THE COURT: So that that was at least favorably within the scope of their wiretap order after it was enlarged on the 22nd?

MR. SILVERGLATE: If that's the case, if one interprets the order that way, then effectively we are saying that the State D.A.'s office now had a carte blanche to listen in on anything relating to the Ostrer trial.

THE COURT: No, not anything relating to the Ostrer trial, anything which involved possible coercion of a witness which Mr. Scotti told us.

I am not making that finding, I am just posing a question. If --

MR. SILVERGLATE: Certainly, your Honor, the discussion between Ostrer and DiLorenzo about Ostrer's taking the stand, does not come within that category.

THE COURT: And that was not put in the plant notes?

MR. PEDOWITZ: No, it is not in the plant notes.

THE COURT: All right.

MR. SILVERGLATE: There were earlier discussions about that that we will get to in a minute.

Tape 3826 I have nothing.

Do you, Mr. Pedowitz? That's B-5.

MR. PEDOWITZ: The tape began, your Honor, as of February 9, 1973, well after the trial and it would be entirely irrelevant.

THE COURT: Yes.

I don't see the need on this motion to take any tapes after the case was fully submitted to the jury.

MR. SILVERGLATE: Okay. I will go back now to some other earlier ones.

The "C" series of tapes. 3820 is a tape of a wiretap that lasted from December 20, 1972 until February 8, 1973.

The first conversation on that tape that is of interest to the defense, has Seymour Greenfield saying that Moss wants to meet him, that is Greenfield, at two o'clock in Moss' car.

Ostrer, who is on the other end of the telephone, says that Greenfield should not go.

Moss, he says, has a tape recorder in the car. Ostrer then says to Kilroy, William Kilroy, a Fringe employee

who gets on the phone, that Ostrer agreed to a non-jury trial,but Dioguardi wants a jury.

Kilroy then suggests that Ostrer must now move for a severence.

Jay Goldberg will not waive a jury. Goldberg was Dioguardi's lawyer. Ostrer says a severence simply will not be granted by the Judge. Ostrer says maybe that's an appealable issue.

Ostrer says it would be okay if the Judge would permit Ostrer to take the stand without the prosecutor going into his prior conviction. Ostrer then begins to talk about other trial details, including the list of witnesses and the fact that he still has to examine some documents.

THE COURT: Any mention of Moss?

MR. SILVERGLATE: No mention of Moss here.

Suddenly the tape is cut off partway through this conversation about the trial.

MR. PEDOWITZ: Your Honor, I have marked for identification Government's Exhibit P, which is a plant report of December 28, 1972. This again reflects portions of this conversation, the ones that were obviously of interest to the police officers, and it is the portion about a potential meeting with Moss and the fact that Moss might have a tape recorder. I hand this up to the Court.

THE COURT: Mark it in evidence.

MR. SILVERGLATE: The only way it mentions Moss is in the beginning.

THE COURT: Yes.

MR. PEDOWITZ: Your Honor, we prepared a transcript with respect to part of that conversation, the part that was of interest to us. It is Government's Exhibit T-8. The conversation, I believe the plant report reflects, occurred on December 28, 1972.

(Government's Exhibit P was received in evidence.)

THE COURT: Do I have T-8?

MR. PEDOWITZ: I believe you do, your Honor. If you don't, I have another copy of it.

THE COURT: Yes, I now have it.

MR. PEDOWITZ: I think the plant report does indicate that the State was not interested in the trial strategy, but only the relationship to Moss.

THE COURT: All right.

MR. SILVERGLATE: Of course in that context, the question of whether Ostrer was going to take the stand was very important.

This indicates clearly he would take it if the Judge would rule that his prior conviction did not come in.

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Ultimately, Judge Edelstein ruled it would have to come in and he did not take the stand.

THE COURT: That kind of a ruling, even in the days before the new rules, was relatively foreseeable. Most attorneys wouldn't have any difficulty knowing what a Court would rule on that, don't you think?

MR. SILVERGLATE: Probably not.

THE COURT: All right.

MR. SILVERGLATE: There is a conversation betwee Greenfield and November.

November says that Edelbaum believes that the Judge may solve the problem by not letting in evidence of Ostrer's prior conviction. They still don't think that Johnny Dioguardi would agree to waive a jury.

Finally --

MR. PEDOWITZ: Can we stop at each point, so I can have an opportunity to agree?

THE COURT: Yes.

MR. PEDOWITZ: I agree with that, your Honor, and I have a note here and I believe it should be on that same page that I just handed up to you, your Honor, Government's Exhibit -- I forgot the letter now.

THE COURT: Do you mean Mr. Edelbaum thought he could copy out the prior conviction?

MR. SILVERGLAZE: He thought he could convice Judge Edelstein to so rule. The reason he thought that he could get Judge Edelstein to rule that way is because Mr. Ostrer moved for a jury waived trial.

Judge Edelstein said he would give them a jury waived trial, but not if Mr. Dioguardi wanted a jury. Dioguardi did not waive a jury and Judge Edelstein said they would not sever.

Ostrer moved to sever and Judge Edelstein did not allow the severence.

MR. DERSHOWITZ: Your Honor, I represented Mr. Ostrer for the certiorari. We did raise the issue, and I think it was a serious one. There have been many courts around the country that have resolved the severence issue by not granting the severence, granting the jury trial, but instead entering a ruling about the prior testimony.

THE COURT: Don't you need the consent of the government to waive a jury trial?

MR. DERSHOWITZ: You need the consent of the government. In this case the government had consented. What happened is that they had not consented to a severence and since one of the co-defendants --

THE COURT: Then they really didn't consent. All they said was that if both sides waived, if everybody waived

they would waive.

MR. DERSHOWITZ: They consented to Mr. Ostrer being tried alone and to Mr. Dioguardi being tried without a jury trial, but they didn't consent to a severence, the effect of which was not to consent to the motion.

THE COURT: Why is that so? Would it be feasible, or putting it differently, wouldn't it be feasible to permit the jury to try Dioguardi with the guilt or failure to prove guilt beyond a reasonable doubt as to the co-defendant to be determined by the Judge and the jury wouldn't have to hear the opening and summations on behalf ofthe non-jury defendant.

MR. DERSHOWITZ: I wish your Honor had been on the Court of Appeals or Supreme Court when this issue was raised, because that was precisely what we asked the Court to instruct the lower courts to do in these kinds of cases.

THE COURT: But it wouldn't have been an abuse of discretion if you didn't. I believe if a defendant wanted to waive a jury, the Court does not have to take his waiver. It is interesting, but it does not affect this hearing materially since the government did not block him from having a non-jury trial.

MR. SILVERGLATE: Finally, there is a discussion between Greenfield --

MR. PEDOWITZ: I'm sorry, your Honor, we were in the midst of looking at the note, I believe. I just handed you up a plant report for December 28, 1972.

THE COURT: What number is it?

MR. PEDOWITZ: It is open. I believe it is on the bench.

THE COURT: It is received in evidence.

MR. SILVERGLATE: Finally, there is a discussion where Greenfield tells Ostrer that he, Greenfield, told Moss that November would not let Greenfield see Moss.

Moss told Greenfield that an agreement had to be signed.

Ostrer then on the phone says to Greenfield, "Tell Moss to call Edelbaum."

That's the last portion of that tape.

THE COURT: The date of that is when?

MR. SILVERGLATE: It is somewhere between December 20th and February 8th, but it was obviously before the end of the trial.

MR. PEDOWITZ: Your Honor, the plant report indicates that it is January 2, 1972. The plant of course having a continued interest in the discussions about Mr. Moss.

MR. SILVERGLATE: Then it was in the midst of the

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trial.

MR. PEDOWITZ: No, it was two days before the trial began.

MR. SILVERGLATE: Oh, just before it began.

On 3825 we have nothing. Does the government have anything on C-2?

MR. PEDOWITZ: In addition to that?

MR. SILVERGLATE: That begins on February 8th and ends on February 21st.

MR. PEDOWITZ: No, your Honor, we have nothing of interest.

MR. SILVERGLATE: That's the end of the tapes, your Honor.

MR. PEDOWITZ: Your Honor,there was one other which we had marked as Government's Exhibit T-5. I believe it has already been received in evidence.

MR. SILVERGLATE: Yes. This is very important. If the government really things that the defendant expected he was being taped, this transcript shows that Ostrer thought he had a sweep in his office and it turned out not to have uncovered the tap.

I assume the sweeper should be sued for malpractice.

THE COURT: This is the bug, not the telephone?

MR. SIVLERGLATE: Correct.

THE COURT: D-5 I mean, is that on the bug?

MR. PEDOWITZ: Excuse me, T-5.

MR. SILVERGLATE: That's a bug.

MR. PEDOWITZ: Is a bugged conversation between Mr. Ostrer and Jerry DiLorenzo and Phillip Tartaglia. In fact, your Honor, if the police officer had been asked about this, they would have testified that they did not believe that Mr. Ostrer had done the search of the office and had hired someone to do it, that he was simply representing that fact to Mr. Tartaglia and Mr. DiLorenzo so the meeting could be held in this office.

THE COURT: What could be the possible basis for drawing such an inference reasonably on the part of the police officers?

MR. PEDOWITZ: Because, your Honor, Mr. Ostrer was interested in having the meeting go on and if Mr. Tartaglia and Mr. DiLorenzo, who obviously did not want to have their conversations overheard, were expressing some concern about that fact, Mr. Ostrer was prepared to assure them that in fact there had been a check done when in fact it had not been done.

MR. SILVERGLATE: We can prove that it was done if that's necessary.

THE COURT: I wouldn't have any basis to infer that the statement made to Tartaglia and Jerry DiLorenzo was false in the absence of some proof.

MR. DERSHOWITZ: The proof is to the contrary. We could present a bill.

THE COURT: I will assume it is truthful. The policeman might have a natural skepticism about anything he says, but apparently there was no evidence which permits him to reach that inference.

MR. SILVERGLATE: Fine, your Honor. I think, if your Honor please, I would prefer to handle one problem with a short memorandum. There are some interesting things in the plant logs that have not yet been pointed out. They are all in evidence.

THE COURT: I understand.

MR. SILVERGLATE: I would like to simply submit a brief memorandum. It is better than tediously going through them.

THE COURT: That's really what I would prefer both of you to do.

All right, you are resting, both of you?

MR. SILVERGLATE: Yes.

THE COURT: Does the government have anything further?

MR. PEDOWITZ: No, your Honor.

THE COURT: You are resting?

MR. PEDOWITZ: Yes.

THE COURT: I am reserving decision.

I will now have a discussion with you as to when I will received your post-hearing submissions.

MR. DERSHOWITZ: Your Honor, we would like, as I mentioned earlier, if the Court schedule will permit, perhaps just five minutes to summarize briefly the factual matters. If your Honor prefers to have that in written form we have no strong feelings about that, but we would prefer the five minutes.

MR. PEDOWITZ: I would frankly prefer to have an opportunity to respond in writing to Mr. Dershowitz's presentation.

THE COURT: I will hear either of you briefly without prejudice to having you cover it in full in post-trial submissions.

MR. PEDOWITZ: Your Honor, before we begin, there is one issue that I wanted to bring to your Honor's attention now with the hopes Mr. Dershowitz will address this in his memorandum.

Since the very beginning of this motion I have had some difficulty putting this within the context of the

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usual Rule 33 motion since the newly discovered evidence is not in fact evidence that would be admissible at a trial, but rather is the fact that there has been a possible, indeed that there has been a violation by the State of Mr. Ostrer's constitutional rights, and the question whether or not that carried over to the Federal trial.

For that reason, your Honor, I have to come to the view that this is not really a Rule 33 motion at all, but rather it ought to be treated as a 2255 as a collateral attack on a conviction whichhas now been made final by the denial of certiorari on direct appeal.

For that reason, your Honor, I would like to have this motion treated as a 2255 from now on.

I don't fore a moment suggest that that would moot out anything that has happened up to this point, I think that would be outrageous if it did, but I would like to have this motion treated as I think it ought to be, as a 2255.

If there is any question about the fact that Mr. Ostrer is in custody, I think that's well settled by the Hencely decision of the Supreme Court 411 U.S. in which Justice Brennan indicated that if a person is lodged on bail pending service of a sentence that he is in fact in custody for purposes of 2255 and habeas corpus.

THE COURT: You know, I am just tempted to ask you, I don't want to get drawn into a controversy prematurely as to an issue that I might have to decide and which may be a purely legal issue, but I am tempted to inquire what difference does it make, because it seems to me that regardless of what you call it, if the Court agrees with every contention of fact in law which has been asserted on behalf of Mr. Ostrer, Mr. Ostrer is entitled to have the judgment vacated and in fact it might even be a question of whether he is entitled to a new trial or merely an order dismissing the tradition of the United States versus Mizerach, or some of those old case, but I don't see that it is too significant.

If you think it is important, you can address yourself to it and you have now alerted your adversary that he should do so.

It is a little late that to say there is a want of subject matter jurisdiction because he should have brought it in the form of 2255 petition.

MR. DERSHOWITZ: Your Honor, the earlier judge who was assigned to this case treated it consistently as a motion for a new trial and indeed the government took the position initially that perhaps the motion hadn't been filed timely.

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Our response is that we couldn't pursue it because we did not know about the wiretap and the overhearing of the lawyer=client conversations and that was ultimately accepted by the Court.

I can only understand one distinction that could possibly operate and that is this.

MR. PEDOWTIZ: I will explain what the distinction is.

THE COURT: Let Mr. Dershowitz finish.

MR. DERSHOWITZ: If your Honor were, despite our best efforts, to rule against us in this matter on the facts or the law or both, it would seem to me that everybody in this courtroom would understand this is not a frivolous or insignificant issue, this has been a seriously pursued issue --

THE COURT: This place is too busy for frivolous hearings.

MR. DERSHOWITZ: -- which would be appealed and pending the appeal, I don't think there would be any difficulty in urging this Court to continue Mr. Ostrer on bail pending that appeal.

There is a difference in law between the standard as to whether or not Mr. Ostrer remains free on bail if it is a 2255 on the one hand with the final judgment or a new trial.

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THE COURT: Isn't he on bail pursuant to an order of the Court of Appeals?

MR. DERSHOWITZ: Yes. The Court of Appeals ordered him to be free on bail pending the final decision of this Court.

THE COURT: You know, I can't change the determinations of the Court of Appeals.

MR. DERSHOWITZ: No, I understand that. The Court of Appeals order, I argued it and I was there when it was decided, it ordered that bail must be continued until this Court, your Honor, decides this case.

It then also ordered that if the District Court were then to deny bail, pending appeal, bail would be extended for enough time so that counsel for Mr. Ostrer could come back to the Court of Appeals and seek bail anew from the Court of Appeals, so the Court of Appeals --

THE COURT: That's law of the case, isn't it? At the very least, that's an outstanding direction by the Court of Appeals, for one thing, binding on the District Court and the second thing is it is law of the case, so it doesn't matter what rule or statute you are proceeding under, that's what the Court of Appeals has ruled in this particular case.

MR. DERSHOWITZ: No, but the only relevance is

this:

In your Honor's decision, which I take it is still open under the Court of Appeals ruling, whether to grant or deny bail in the event that the motion is turned down, it might depend on whether it is characterized as a 2255 or a new trial motion, but --

THE COURT: Briefly how?

MR. DERSHOWITZ: We understand the government's contention to be, because I have been involved in several cases on appeal pending 2255, the government's contention wuld be that when the judgment is final and when it is a 2255 collateral attack, that the standard for granting bail is something like the substantiality of the issue on appeal, whereas the standard for granting bail before judgment is final is characterized as frivolous.

Nobody would contend that this appeal could be characterized as frivolous. Indeed, I don't think anybody could contend that it wasn't substantial.

MR. PEDOWITZ: Now, your Honor, may I address the reason that I have?

THE COURT: Certainly, but I am going to direct in his post-hearing brief to address himself to the question of what rule or statute this matter properly should be decided under and why, but I will hear Mr. Pedowitz as a

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matter of courtesy at this time as to why it is important.

MR. PEDOWITZ: Thank you, your Honor.

My reasons for wanting the proper rule or statute to be determined has nothing to do with Mr. Ostrer's bail status, but rather, has to do with a question of whether or not the government has a right to appeal.

Your Honor, I don't for a moment presume that you will decide this issue against the United States. Obviously, I have a position on that, but in the event that should transpire, and whetherit is unlikely or not is for your Honor to decide, the government would like and opportunity to appeal.

The solicitor again has taken the position that a new trial motion is not a final order. He has done that on a number of occasions in conversations with me. Under 2255 a decision by this Court would be a final decision which would be appealable by the United States government.

Since we are of the view that this is in fact a 2255 and not really a Rule 33, we would like at least to have an opportunity to appeal it in the event your Honor should decide it against us.

THE COURT: I have already directed that both attorneys are to address themselves to this matter in the briefs. I don't think I need to say anything more about it

at this time.

MR. DERSHOWITZ: Your Honor, I would just like to try to pull together a few of the loose strands that have developed out of a rather protracted hearing.

THE COURT: Wait just a moment now. My understanding with Mr. Silverglate was that there were a couple of matters he would like to talk about. I did not undertake to hear a full-scale summation. I do not say that you can't talk in place of Mr. Silverglate, but I want you to take up the matters that I said I wanted to hear.

MR. SILVERGLATE: I was suggesting to Mr. Dershowitz that he do that, pull together a few loose ends that are scattered throughout the days of hearings.

MR. DERSHOWITZ: In all candor, your Honor, I had intended to make a relatively brief summation and if your Honor prefers not to hear that, I don't want to burden the Court any further, but let me just go on for three or four minutes and perhaps we can see where we are.

Just in general outline form, there are not considerable disagreements of fact among both sides on the general skeleton.

THE COURT: There are not, you say?

MR. DERSHOWITZ: There are not substantial disagreements. We all agree that in October 1972 the

wiretapping and eavesdropping which was declared unlawful was begun. This was following Mr. Ostrer's indictment and so there was an ear on Mr. Ostrer's trial preparation by the State for the entire relevant period or duration of the pre-trial preparation.

We all agree that on November 21, 1972 the critical conversation occurred which the government claims involved an alleged attempt or effort or conspiracy to possibly obstruct justice and that on that same day United States Attorney McGuire interviewed Mr. Moss.

The day later, on November 27, 1972, Ostrer discussed on the wiretap Mr. Moss' grudge and on November 30, 1972, the conversation that was just played, indicating that Susan Gold refused to talk to Moss, that Ostrer refused to talk to Moss, that Ostrer said he would not get involved in any kind of an osbtruction.

It seems to me that no one can seriously argue that anything illegal occurred on those phone conversations.

As Mr. McCuire himself in his memorandum of April concluded "The only agreement seems to be that Edelbaum should know of the affidavit for cross examination."

It seems to me the statement itself, the affidavit itself with its emphasis on prior inconsistent acts and its emphasis on its use for cross examination purposes, puts to rest any claim that there was an obstruction.

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THE COURT: May I see Exhibit BB?

You can continue.

MR. DERSHOWITZ: Moreover, the tape itself proves that the purpose of the affidavit was not to show to Mr. Moss, but to give to Mr. Edelbaum in the event that the witness took the stand.

The notes taken by Mr. McGuire emphasized that Ostrer himself was diffident about any use of this affidavit and that was November who was the one who was doing the urging.

Thus, if there were any kind of an obstruction it would have been November who was subject to an investigation and November did not receive the three-year sentence, so Mr. McGuire's testimony that the reason he did not investigate Ostrer because he received the three-year sentence would certainly not apply to the investigation in general.

Finally, on this matter, the fact that Mr. Ostrer suspected that Mr. Moss was wired is in itself very strong evidence that no obstruction of justiced was intended. It would have been absolutely foolish to attempt to tamper with a witness who was suspected to be wired during the relevant period of time.

Now, the first chink in the Chinese wall, as the Court of Appeals has referred to these kindsof matters when dealing with communications with wiretap sources and

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the prosecution occurred in this case on November 21, 1972, not November 22, 1972. I call to your Honor's attention the government's own exhibit in this case, the exhibit of Mr. Fine's own diary and you recall Mr. Fine was in the telephone conversation itself and Mr. Fine says --

MR. PEDOWITZ: I assume Mr. Dershowitz means December 21, 1972 and not November.

THE COURT: Yes. Where is the Gold affidavit? I believe it is Exhibit BB?

I don't like to interrupt counsel, but I wanted to look at it while he was talking.

MR. DERSHOWITZ: We have a copy of that, your Honor, which might serve for these purposes at least.

THE COURT: You may continue.

MR. DERSHOWITZ: I think it is important to note, your Honor, that Mr. Fine's own note indicates that Sil Mollo, an Assistant United States Attorney in the Southern District returned call at 12:30 p.m., indicated the import of our information.

In other words, Mr. Fine's own notes suggest that the first chink occurred on December 21st; that there was substance communicated between Mr. Scotti and Mr. Mollo.

THE COURT: You see, so many people are inexact in their English and it is getting to be terrible

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among young lawyers. Something which you might address yourselves to is I don't know when he says import if he means import or importance. I just don't know. The import of the matter would be the substance of it and there would be no need for making McGuire trot himself down to 100 Centre Street the next day if he gave the import of it to Mr. Mollo over the phone; so I think you start with the assumption that you have an illiterate lawyer who has written down import when he should have written "importance."

MR. DERSHOWITZ: If your Honor reads the record, you will find that Mr. Fine was absolutely meticulous in his use of notes and English, but that's for your Honor to decide.

THE COURT: If he meant import, why did they take the time and trouble to have McGuire go down there?

MR. DERSHOWITZ: Because the import was by two superiors and perhaps there was a desire to have direct communication between the two parties, certainly the government's own lawyer.

As to the meeting itself, the December 22nd meeting which is the main and second chink in the Chinese wall.

It seems to me the Court should address itself with all due respect to the question of what was the purpose of that meeting. The purpose, the government says, was to

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prevent an obstruction and there are three possible ways in which an obstruction could have been prevented;

One by indictment. Everybody concedes there wasn't enough information conveyed to secure an indictment.

Second, as your Honor suggested, protective custody, but it seems to us, your Honor, that this meeting occurring thirty-one days after the alleged obstruction and after the government now contends all the damage was done couldn't possibly have caused protective custody at this late stage.

The only reason for a meeting on the very eve of the trial, a month after th alleged obstruction, would be to see to it that Mr. Moss was not called as a witness. That was the only way to prevent the obstruction.

So we argue it was the intent of the District Attorney to see to it that Mr. Moss was not -- who we knew was a vulnerable witness, would not be called.

Mr. Fine knew two things:

He knew there was a witness named Moss and Mr. Fine knew also from the tape that the government didn't know about Moss' vulnerability, so he intended to see to it one way or another by entirely legitimate means in his view, that Mr. Moss was not called and the government did not fall into a trap.

THE COURT: I might say that perhaps both of you very cogently and briefly could set forth what you consider to be the elements of the State crime of coercing a witness to which Mr. Fine had reference.

MR. DERSHOWITZ: By all means, we will, your Honor, in the memorandum.

THE COURT: If there are any cases -- I am somewhat puzzled. I always thought traditionally if you told somebody the truth that ordinarily did not violate the law.

MR. PEDOWITZ: Your Honor, I have the statute with me if you care to be referred to it.

THE COURT: Hand it to the clerk. Whatis the citation?

MR. PELOWITZ: There are two coercion statutes in State law. One is Section 135.65, coercion in the first degree.

There is also coercion in the second degree, Section 135.60.

THE COURT: You can pass the statute to the clerk.

MR. PEDOWITZ: I believe, your Honor, that in fact a truthful statement delivered to a witness which in essence threatened to damage him and subject him to ridicule would in fact be a State crime, a misdemeanor.

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MR. DERSHOWITZ: There is simply no doubt under the Sixth Amendment that it would be absolutely protected constitutional conduct for an attorney to do what the government does all the time, in effect, present its Brady material to the other side and to say, to a witness, "Look, you are going to be the witness. You should tell the truth and you should know we have a prior inconsistent statement by you."

In this very courtroom I have seen the United States Attorney on at least one occasion go over to my witness and say "You better tell the truth. If you say what you said in that affidavit, you are going to be subjecting yourself to a perjury prosecution."

This was a far less coercive statement, there is simply no doubt, and we will provide a memorandum on it.

The language of the statute says --

THE COURT: You don't have to read it now.

MR. DERSHOWITZ: It just says in sum that it is an affirmative defense that the defendant reasonably believed the threatened charge to be true and that his sole purpose was to make or compel or induce the victim to take reasonable action to make good the wrong which was the subject of such threatened charge.

MR. PEDOWITZ: I believe Mr. Dershowitz is reading

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from the practice commentary of section --

MR. DERSHOWITZ: No, that's the statute --

THE COURT: Please, gentlemen, I don't want to get into this now.

MR. PEDOWITZ: Of 75, not 60, your Honor.

MR. DERSHOWITZ: On this matter finally the testimony elicited I think proves beyond any doubt that all the memories of all the participants as to this critical meeting are hazy as to exactly what was communited; who spoke; how long the meeting occurred.

The best evidence of this wouldhave been Mr. Fine's notes. It seems to me this Court is entitled to draw an inference from the absence of those notes and that those notes would be favorable and would help establish the defendant's case.

Just for a moment to think about the extreme unfairness that the defendant labors under, his conferences with his attorney are available to the government on tapes so that the government can cross examine off those very tapes and we don't even have the notes of the meeting, the critical meeting which occurred.

Now, an example of how subtle communication for example could occur at this kind of a meeting:

Fine knew that Ostrer was not going to take the

witness stand. He learned that illegall · by overhearing a tape.

McGuire then asked him for impeachment information in the event that Ostrer took the witness stand. How much imagination does it require to think that Fine might have subtly communicated to McGuire without himself knowing it, without McGuire necessarily knowing it by gesture, by remarks, by lack of interest, the fact that he doesn't have to worry about that; don't worry Ostrer is not going to take the witness stand.

This is exactly the reason why the Supreme Court has said and why the Third Circuit and the Second Circuit has said, and we will show in our memorandum, that the ability to discern precise communication and precise prejudice is beyond counsel, particularly in the absence of any notes or contemporaneous notes on the meeting.

The government alleges that it was not at all that the State was not at all concerned with tainting the federal trial and that the only instruction that was given to Fine was not to indicate the source of the information.

That becomes a very important argument in favor of the defense, ultimately, because if the government was not concerned, if the people were not concerned about tainting the federal trial, then surely they had no reason for not

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giving background information, for not communicating other information so long as it simply did not indicate the source of that material.

THE COURT: You are rejecting Garabedian on this particular issue then?

MR. DERSHOWITZ: We are saying the government cannot have it both ways. That is, taking the government's argument at its strongest that there was no concern, it certainly helps us. Taking our argument it fits into the theory that what Fine wanted to do was without tainting the federal trial to communicate the critical piece of information that Moss should not take the witness stand.

Now, finally, it seems to me the government's base line argument in the last analysis is that in any event McGuire had no intention of using Mr. Moss.

Now, here McGuire's argument -- McGuire's recollection gets progressively stronger as time passes. In his first affidavit, uncertain. He said, "Well, I had just about decided not to use him."

In his second affidavit in response to our counter-argument he said well he would be available in case my trial plans changed.

And in the testimony he said he hadn't eliminated to a mathematical certainty the possibility that he would be

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called.

Now, any experienced trial lawyer, which I do not count myself among, but which I think your Honor rightfully does, would realize that the decision whether a trial has changed, whether to call a witness is depending on two factors, one an appraisal about how the trial is going and the other, the appraisal of the risks of calling the witness.

Had the government not known what it knew about Moss the threshhold for calling him might certainly have been lower and in this case, when your Honor reads the transcript he will know that Hellerman, the government's main witness, was effectively impeached.

The government went to the jury with a weak case. It took three and a half days of jury deliberation. It is our argument that had Mr. McGuire not known about the absolutely disqualifying aspect of Moss' testimony he might have called him after Hellerman had been demolished.

Now, the key to that is that Mr. McGuire testified very significantly that he did not reveal the fact that he wasn't going to call Moss because that would tip the defense to the fact that he was using Hellerman. Implicit in that is an argument that Moss and Hellerman were roughly equivalent witnesses. Otherwise, how would the failure to subpoena Moss in any way tip the defendants that

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Hellerman was going to be called?

Again the government cannot have it both ways. If the revelation of the fact Moss is not to be subpoenaed would tip them to Hellerman, obviously Moss was a critical substitute witness for Hellerman, who might very well, you will recall, had he been available, but it is our argument he is totally disqualified and made totally not available as soon as the government heard, as soon as Mr. McGuire heard that there was a real problem with him and there was a potential obstruction and since that information came improperly and unlawfully from the State, it is our view that without regard really how your Honor finds contested facts it seems to me that even on the government's own concessions about what occurred, combining that with some simple common sense appraisals of how trial strategy works, how complicated and how subtle and how imponderable some of these matters are, that this Court cannot conclude beyond a reasonable doubt and that is the standard as we will argue, this Court cannot conclude beyond a reasonable doubt that Mr. Ostrer was not in some subtle way prejudiced by the government's receipt of admittedly improper trial strategy information.

Thank you, your Honor.

THE COURT: Thank you.

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We will take a short recess.

(Recess.)

MR. PEDOWITZ: Your Honor, I will be very brief because I had not prepared any outline of an argument for this afternoon thinking that this would all be done in written form.

THE COURT: I don't require you to make any argument, Mr. Pedowitz.

I was extending the courtesy to counsel who wanted to make one. If he wanted to make one you have the right to make one. That doesn't mean you have to make it.

MR. PEDOWITZ: Your Honor, having been trained in the legal profession, one always like to leave the last word and for that reason --

THE COURT: You didn't listen to Mr. Edelbaum, did you?

MR. PEDOWITZ: No, I didn't, your Honor, not in tha regard. I have long been of the view that if the government is given an opportunity to sum up last, it ought to and I will attempt, therefore, to shed a little bit of light on our view of these matters.

Mr. Dershowitz began by saying that there was very little that was factually in dispute here. I'm not sure that I agree with that completely, for quite a number of reasons,

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but I agree that there are a number of things which are not factually in dispute.

One of those things is that the federal government had absolutely nothing to do with the wiretap. The federal government did not authorize it, it was not interested in it and was more or less dragged into this by the State authorities who felt that they had an ethical obligation to convey what they in good faith thought was a possible obstruction of justice might occur in the federal court.

Mr. Dershowitz has pointed to a number of prejudices which Mr. Ostrer might have suffered. He claims first of all that had this meeting not occurred Moss might have been called as a federal witness and he argues that it is a very subtle matter as to whether or not a witness should be used at a trial.

I submit, your Honor, that that may be true in some instances, but in this particular case there is nothing very subtle about it.

Indeed, it is a very mundane matter. It seems that everybody who came into contact with Mr. Moss uniformly agreed that he would not be a very good witness and nobody wanted to call him as a witness. The grand jury minutes of Mr. Moss and the SEC minutes with regard to his testimony make it perfectly clear why the government did not want to

use him as a witness. Mr. McGuire testified that he interviewed Moss and he confirmed what was in his grand jury testimony.

His grand jury testimony was to the effect that yes, Mr. Ostrer had sold him about 2,000 shares of stock; yes, he had paid $30,000 for that; yes, Mr. Ostrer had given him a hold-harmless agreement with respect to the stock, but Mr. Ostrer never told him that he knew anything about the manipulation.

Now, to claim that Mr. Moss, based on that testimony which was re-confirmed in Mr. McGuire's office, culd have been used as a substitute for Mr. Hellerman at the federal trial, is little more than preposterous.

Mr. Hellerman testified about Mr. Ostrer's knowledge of the manipulation, the fact that he was fully apprised that the brokers were kicking the stock back and forth and Mr. Moss knew nothing at all about the manipulation.

He claimed that he trusted Louis Ostrer as an investment adviser, even though he had lost money in previous deals with Louis Ostrer.

THE COURT: Why was Moss called before the grand jury?

MR. PEDOWITZ: He was called before the grand jury, your Honor, doubtless because the government in an

attempt to make a full investigation, I might add that there were many, many, many witnesses before the grand jury.

THE COURT: But he had been to the SEC before.

MR. PEDOWITZ: That's correct, your Honor, and as a federal prosecutor, I would call any witness who had been investigated or called before the SEC to testify before the grand jury.

THE COURT: Even if his SEC testimony were immaterial?

MR. PEDOWITZ: Yes, your Honor, I would call him before a federal grand jury to have an opportunity to question him by myself.

THE COURT: I take it his SEC testimony is not inconsistent with his grand jury testimony?

MR. PEDOWITZ: I do not believe it to be in any material respect inconsistent. I might add, your Honor, that Mr. McGuire did not call Mr. Moss before the grand jury. In fact, it was, I believe, it is Mr. Updike and that's reflected at the top of the grand jury minutes.

THE COURT: He being an Assistant United States Attorney in this District?

MR. PEDOWITZ: A former Assistant United States Attorney, yes, your Honor.

Therefore, your Honor, what Mr. Dershowitz views

as subtlety we do not.

In addition, Mr. Dershowitz has claimed here today that Mr. Fine might have inadvertently threw a hand gesture or otherwise conveyed the fact to Mr. McGuire that Mr. Ostrer would not take the stand at his federal trial. Mr. Dershowitz claims that Mr. Fine knew that fact on December 21s that Mr. Ostrer would not take the stand. I don't believe that Mr. Fine knew that fact. I do not believe that fact is reflected in any plant report and I do not believe that that fact is reflected on the tapes which occurred prior to December 21, 1972.

In any event, Mr. Fine's interest in the federal prosecution was minimal. I think it is reflected by the fact that up through December 21, 1972, Mr. Fine had not the slightest idea where the federal prosecution might be. When Mr. Scotti called Mr. Moss, I think that was a very significant fact.

MR. Dershowitz has also claimed that there were a number of breaches of the Chinese Wall in this particular case, and that the first one really occurred on December 21, 1972, when Mr. Scotti talked to Mr. Mollo, and Mr. Dershowitz points to Mr. Fine's diary which reflects that the import of the information might have been conveyed.

Mr. Mollo had no recollection of the conversation

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whatsoever, which leads me to believe that the conversation was far less significant to him than Mr. Dershowitz would make it seem to be.

THE COURT: It was sufficiently significant to him that he verified that Mr. McGuire was handling the matter and since all of us have had some experience with Mr. Mollo, I believe he knew who was handling the matter; that he went and verified it anyway and told Mr. McGuire to be in touch with either Fine or Scotti, as the case may be.

MR. PEDOWITZ: I submit, your Honor, that based on Mr. Scotti's testimony and based on Mr. Fine's testimony, what happened was that Mr. Scctti called Mr. Mollo, after having found out from Mr. Moss that nobody in the Eastern District was handling the case and said "Sil, we have some information which might be of interest to the person handling the Ostrer case. Please have the Assistant handling that case contact Mr. Fine."

That, your Honor, is precisely what happened. Mr. Mollo would not let something like that slide knowing Mr. Scotti and his reputation in the legal community, in the law enforcement community. He would naturally have contacted Mr. McGuire and said "Get yourself over there and talk to Mr. Fine."

That, I submit, is precisely what happened.

In addition, Mr. McGuire testifi- quite explicitly that Mr. Mollo convey no other information othe than "Get yourself over there." He was quite definite about that.

Now, to say that Mr. Mollo had some information that might have been transferred to Mr. MCGuire in addition to what he learned the next day in talking to Mr. Fine, we submit is utterly unsupported by the record.

Your Honor, we are of the view that this case is a very simple case. The question is simply whether anything was done differently than it would have been had Mr. Fine never contacted or spoken with Mr. McGuire and we submit we have borne our burden of showing that what limited information was transferred to the federal government had absolutely no effect on the federal trial.

The information was of two sorts:

First, that Mr. Moss might be tampered with. Mr. McGuire made it perfectly clear that he did not intend to call Moss before he went to that meeting. Looking at his grand jury testimony, looking at Moss' grand jury testimony and his SEC testimony, it is perfectly clear why Mr. McGuire did not want to use him. He frankly did not believe him.

The second bit of information that was transferred on that date was the fact that Mr. Lynch might be

employed by the FBI and might be being used by Mr. Ostrer.

The fact that a private investigator might be used by Mr. Ostrer or Mr. Dioguardi would hardly come as a surprise to an experienced assistant used to trying cases of this sort. Private investigators are not an uncommon matter.

In addition, your Honor, as you listened to the tape today you heard a conversation in which Mr. Ostrer revealed the fact to Mr. Moss that Mr. Lynch was employed by him and was working as a private investigator. To assume that this was some sort of secret weapon is, we submit, in light of that conversation, when Mr. Ostrer was communicating to a man who was in fact, he believed, a cooperating government witness, simply a non sequitor.

Your Honor, at this time I don't think it would be very helpful for me to go into much more detail.

THE COURT: As I said, I am not requiring you to do so. I would like to set a schedule for filing of papers. I also want you to do one more thing, confer with the clerk and make certain the Court has received in evidence all exhibits which each of you want to have before the Court because I consider my clerk's minutes as the final word on what documents have been received in evidence.

So before you leave here today, make certain

that everything which each of you think is in evidence is so indicated on the clerk's minutes.

MR. PEDOWITZ: Fine, your Honor. Shall we also gather together the exhibits and have them transferred to you since they will probably do very good to us having them in the files .

THE COURT: All right. You can work that out with the law clerk.

MR. PEDOWITZ: Fine, your Honor.

THE COURT: I want to make certain of what I have so nothing gets lost or strays. We don't have unlimited facilities for such matters in chambers.

Shall we have an off the record discussion limited to the date for filing post-hearing memoranda?

MR. PEDOWITZ: Certainly.

(Discussion off the record.)

THE COURT: Gentlemen, I will accept the post-trial memoranda on behalf of Mr. Ostrer to arrive on March 16th at my chambers, the government's answering papers by March 29th and if there is to be a reply, the reply will arrive at least by April 5th and the matter will be fully submitted on April 5th for decision.

If you find you don't need a reply, kindly just write a letter saying that you don't intend to reply.

MR. DERSHOWITZ: By all means we will do that.

THE COURT: Now, I also want to make certain that I have available to me the transcript of the prior trial. I don't know if that's in the clerk's office or not.

MR. PEDOWITZ: I have a copy, your Honor. I have alerted Mr. Sneider to that fact. The only thing that it does not contain, I believe, are openings and summations.

THE COURT: Didn't they record those?

MR. DERSHOWITZ: We have those, your Honor.

MR. PEDOWITZ: My copy does not contain those.

THE COURT: They should be somewhere in the courthouse.

All right, Mr. Ostrer, you are continued on bail subject to the further directions of the Court. You understand your obligations in connection therewith.

THE DEFENDANT: Yes, sir.

THE COURT: Stay in touch with the attorneys who represent you in this matter so that they can reach you at all times.

The hearing is closed, decision is reserved pending full submission of papers by April 5th.

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EXHIBIT INDEX

Government	Identification	In Evidence
CC	449	
J,K		454
L		457
N		460
M		473

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

- v -

LOUIS OSTRER,

Defendant.

AFFIDAVIT

71 Cr. 558 (CLB)

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:
SOUTHERN DISTRICT OF NEW YORK)

HAROLD F. McGUIRE, JR., being duly sworn, deposes and says:

1. I have been informed that an entry in Mr. John Fine's 1972 diary reflects that on December 29, 1972 I returned a phone call to Mr. Fine at which time I advised him that Aubrey Moss had been "resubpoenaed."

2. I have no present recollection of that phone conversation, although I do not dispute or deny that a telephone conversation occurred on that day. When Mr. Fine and I met in his office in late 1972, Moss was already under subpoena, and I believe Mr. Fine expressed to me a concern that nothing be done to change Moss' status in that regard or otherwise to alert Mr. Ostrer to the existence of the ongoing investigation being conducted by Mr. Fine's office. At some time after the meeting, I instructed Mr. Goldman, an SEC investigator, to contact Moss to alert him that -- while Moss would not be required to appear on the first day of trial -- his subpoena would simply be adjourned from day to day, and he would

remain subject to call. In light of Mr. Fine's previously expressed concern, it is likely that, after our meeting, he called me to confirm that Moss was under subpoena.

3. I am as certain as I can be of anything under these circumstances that when I returned Mr. Fine's call, Mr. Fine did not convey to me any additional information concerning Mr. Ostrer's case, or concerning his own office's investigation. If he had done so during the phone call, I am sure I would have some recollection of it.

4. I have examined the Ostrer files in the United States Attorney's Office and my 1972 diary, and have found no notations whatsoever about this December 29, 1972 phone call.

HAROLD F. McGUIRE, JR.

Sworn to before me this 29th
day of March 1976

Notary Public

BARBARA JOAN POPLAWSKY
Notary Public, State of New York
Qualified in Queens County
Commission Expires March 30, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

United States of America

versus

Louis Ostrer,
Defendant

Affidavit

71 CR. 558 (CLB)

JOHN C. FINE, being duly sworn, deposes and says:

1)In late December 1972, I called Assistant U.S. Attorney Harold McGuire to determine whether he had complied with the request I made of him of December 22, 1972, not to do anything that would alert Mr. Ostrer that the District Attorney's office was investigating him.

2)Mr. McGuire was not available when I called but he returned my phone call of December 29, 1972. Mr. McGuire told me that Moss had been resubpoenaed and he, McGuire, had not conferred with Moss.

3)These facts are all reflected in a diary for December 29, 1972, which I have been told was Government Exhibit B for the purpose of Mr. Ostrer's motion for a new trial and which was prepared by me immediately after the phone call. I prepared no other notes of this conversation.

4)Other than the discussions I testified to at the hearing, I have no recollection of any subject of discussion with Mr. McGuire on December 29, 1972 or at any other time prior to April 1973.

5)I am, however, certain that I conveyed no information derived from the Electronic Surveillance of Mr. Ostrer to Mr. McGuire on either December 29 or at any other time prior to April of 1973, except for those matters which I testified to at the hearing.

John C. Fine

Sworn to before me this 30th day of March, 1976:

My Commission Expires April 30, 1976

Notary Public

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - -X

UNITED STATES OF AMERICA, :

71 Cr. 558-CLB

-v- :

FINDINGS OF FACT
AND CONCLUSIONS OF LAW
FOLLOWING HEARING ON MOTION
PURSUANT TO RULE 33, F.R.CRIM.P.

LOUIS OSTRER, :

Defendant. :

- - - - - - - - - - - - - - - - - - - -X

Brieant, J.

On January 26, 1973, after a three-week jury trial before Chief Judge Edelstein of this Court, defendant Ostrer was found guilty on eleven counts which charged him with violation of various provisions of the federal securities laws, mail fraud and conspiracy so to do.[1/] The trial court acquitted Ostrer of twenty-three counts upon motion, and the jury acquitted him on the six remaining counts in this forty count indictment. The conviction was affirmed on appeal sub nom. United States v. Dioguardi, 492 F.2d 70 (2d Cir.), cert. denied, 419 U.S. 829 (1974).

Following the conclusion of his trial on these charges, Ostrer was arrested and indicted on unrelated state charges. In 1975, Ostrer's state indictment was dismissed when it became evident

that the state's prosecution was founded upon electronic surveillance conducted pursuant to court orders, which, in turn, relied for their issuance upon the use of evidence later found to be tainted.

Ostrer now moves pursuant to Rule 33, F.R.Crim.P. for a new trial on these federal charges, based on newly discovered evidence, claiming that he was deprived of a fair trial and that his Fourth and Sixth Amendment rights were violated. An evidentiary hearing was held, during the course of which tapes of the electronic surveillance were received. For the reasons stated herein, defendant's motion for a new trial is denied.

Initially, we reject the Government's contention that defendant's instant motion pursuant to Rule 33, F.R.Crim.P. for a new trial should be treated by this Court as an independent action pursuant to 28 U.S.C. §2255 in the nature of a collateral attack upon the judgment of conviction. The issues raised are properly before this Court as a motion based on newly discovered evidence, since the fact of the state's electronic surveillance and the extent of its claimed intrusion upon his rights were unknown to him at the time of trial. Although the issues raised here constitute an attack on the judgments of conviction on constitutional grounds, which

would be cognizable also in a §2255 action, there is a substantial overlap between the relief available pursuant to Rule 33 in the original criminal proceeding, and that available in a §2255 action. See 2 Wright, Federal Practice and Procedure §552 (1969). Defendant may elect to raise these issues, as he has done here, by motion for post-trial relief based on newly discovered evidence. In so doing, defendant assumes the burdens traditionally imposed on a defendant seeking such relief. See United States v. Slutsky, 514 F.2d 1222 (2d Cir. 1975). It must be observed that a court will not lightly refashion litigation seeking post-conviction relief. See United States v. Huss, 520 F.2d 598 (2d Cir. 1975). Where relief may be available under either Rule 33 or §2255, defendant should be permitted to litigate the issues in such form as he chooses.

Accordingly, we proceed to a consideration of the merits of the issues as framed by the defendant in his motion.

The Unlawful Electronic Surveillance.

On October 25, 1972, while Ostrer was awaiting trial under this federal indictment,[2/] New York City police officers assigned to the Rackets Bureau of the Office of the District Attorney, New York

County (hereinafter "D.A.'s Office") began electronic surveillance of Ostrer at premises leased to Fringe Programs, Inc. and Louis C. Ostrer Associates, at 377 Fifth Avenue in this City. The surveillance was authorized initially by orders of Justice Harold Birns of the Supreme Court of the State of New York, New York County, signed October 24, 1972. The D.A.'s investigation, at this time, was directed at obtaining evidence of suspected violations of the state's criminal usury law.

The surveillance "monitoring plant" was staffed solely by New York City police officers on assignment to the D.A.'s Office, and not by federal law enforcement personnel. These police officers would eavesdrop, using bugging and telephone wiretapping devices, and would record selectively those conversations which they deemed relevant to their investigation. Most other conversations were summarized in written "plant reports" maintained by the surveilling officers. Pursuant to instructions of the District Attorney, and in order to preserve security, all such reports were made solely to persons affiliated with the D.A.'s Office and directly concerned with the investigation.

The orders authorizing the surveillance were renewed upon the order of Justice Birns, signed on November 22, 1972.

Among the conversations memorialized on tape or summarized in the written plant reports, are several in which the impending federal trial is mentioned, and matters pertaining to it are discussed. In these conversations, Ostrer and several of his associates discuss pre-trial developments in the federal case. Participants in these conversations include various associates of Ostrer, among them Julius November whose relationship with Ostrer will be discussed further infra, pp. 6-7.

Among the more significant topics discussed were, (1) whether Ostrer should seek a trial severance from his co-defendant John Dioguardi; (2) whether Ostrer should waive his right to a jury trial and testify in his own behalf; (3) the likely impact of Ostrer's testimony, considered in light of disclosure on cross-examination of his prior state felony conviction as impeachment; and (4) the tactical value of having Ostrer introduce certain cancelled checks.[3/] Also mentioned was the name of Ostrer's private investigator, one James Lynch, formerly of the Federal Bureau of Investigation. None of the conversations were with Maurice Edelbaum, Esq., then Ostrer's counsel of record in the federal case, but at times the conversations included discussion by others with Ostrer of Mr. Edelbaum's comments and advice.

These conversations cannot properly be characterized as defense strategy sessions. News of pre-trail developments was discussed and treated conversationally, as a current development in the life of Ostrer, much the same as any other important event might have been treated or considered. In numerous conversations, no attorney is present, and, in some, Ostrer is only an occasional participant. The tenor of these conversations varies, ranging in intensity from casual conversation to shouting bouts. Taken separately or together, except for those noted below, the conversations are of little significance.

The November 21 and 30, 1972 Conversations.

On November 21, 1972, the surveilling officers overheard and recorded a conversation between Ostrer, William Kilroy and Julius November.

November is a New York attorney admitted to practice in this Court. He is a long standing friend and business associate of Ostrer. Since 1962 or 1963, November has represented Ostrer in various non-criminal matters, including civil litigation. Ostrer's trial counsel, Mr. Edelbaum, conferred with November on occasion prior to trial.[4/]

At trial, November was a spectator, who occasionally walked over to the defense counsel table during court recesses. He did not appear as an attorney.

We are persuaded that during the course of pre-trial preparation, Ostrer reasonably believed that November was extending legal counsel, rather than friendly advice. The testimonial privilege against disclosure of attorney-client communications is applicable where the client entertains good faith beliefs (even if erroneous) that the person consulted is a lawyer, and is acting as such on his behalf. Wigmore on Evidence, §2302 (McNaughton rev.). Here, there is no doubt that November was an attorney, and that Ostrer knew that was his profession. In this context, we are concerned with more than a testimonial privilege. We are concerned with safeguarding a criminal defendant's constitutional rights to a fair trial and the effective assistance of counsel. We therefore conclude that, for purposes of this motion, November was acting as an attorney for Ostrer. Cf. United States v. Scott, 521 F.2d 1188 (9th Cir. 1975).

The November 21st conversation, which began with a discussion of certain loans owed by the participants, soon degenerated

into a shouting match between Ostrer and November, liberally sprinkled with obscenities. November then showed Ostrer a typewritten statement he had prepared, signed by Susan Gold, an employee in Ostrer's office, and dated November 21, 1972 (Exhibit BB).[5/] A discussion ensued concerning the contents of the statement and the use to which it could be put. From the conversation an eavesdropper could infer that the statement disclosed that Aubrey Moss, a married man whom Ostrer and November believed would be a Government witness in this case, was having an adulterous affair with Miss Gold.[6/]

November suggested that Miss Gold's statement was so potent and would tend to discredit Moss' reputation to such a degree that Moss could not afford to take the stand and risk its disclosure.[7/] November also suggested that Gold would be available as a witness to impeach Moss' credibility if he did take the stand, and that her written statement would be valuable if Gold were to recant. November advised Ostrer not to give his trial counsel, Mr. Edelbaum, a copy of the Gold statement, but to retain it for later use. Ostrer questioned November whether this was blackmail or intimidation of a witness and November assured him that it was not.

November testified that he had never tried a criminal

case in federal court. I believe this to be true. Attorneys familiar with federal practice in criminal cases would realize the unavailability of this information for impeachment purposes. Indeed, Mr. Edelbaum testified (Tr. pp.358, et seq.) that, under the then prevailing rulings on evidence, he did not believe that an accusation of adultery could be used in this District to impeach a witness. In this he was correct.

While Rule 608(b), F.R.Evid. might suggest a different rule, at the time of Ostrer's trial the rule was as explained in United States v. Semensohn, 421 F.2d 1206, 1208 (2d Cir. 1970):

> "It is settled that in a trial a witness's acts of misconduct are not admissible to impeach his credibility unless the acts resulted in the obtaining of a conviction. It is also settled law that a conviction does not become a final conviction until sentence has been imposed and until the time for an appeal from the judgment has expired."

There are many cases to the same effect. They include United States v. Nuccio, 373 F.2d 168, 171 (2d Cir.), cert. denied 387 U.S. 906 (1967), affirming a conviction where defendant was precluded from cross-examining a witness as to homosexuality to impeach credibility. The Court held:

> "Weighed against the rather slight probative value, the adverse effect of such evidence in improperly discrediting and embarrassing the witness justified the trial court in excluding it. See 3 Wigmore, Evid. §951 (1940 ed.)."

See also, United States v. DeSapio, 456 F.2d 644 (2d Cir.), cert. denied 406 U.S. 933 (1972), [witness Itkin's subornation of perjury, absent a conviction, not admissible for impeachment of general credibility]; United States v. Bowe, 360 F.2d 1 (2d Cir.), cert. denied 385 U.S. 961 (1966), [witness called to testify that chief Government witness asked him to participate in plan to blow up Statue of Liberty]; United States v. Glasser, 443 F.2d 994 (2d Cir.), cert. denied 404 U.S. 854 (1971), [prior criminal acts not resulting in a conviction may not be made the subject of direct proof]. In sum, we believe, with Edelbaum, that the trial judge would have precluded any inquiry on cross-examination as to Moss' adulterous relationship with Gold, and are certain that any direct proof, through testimony of Gold as to that misconduct would have been excluded. If the possible coercion inherent in delivery of Gold's statement to Moss' wife or children would have inhibited Moss, the prosecutor had adequate counter forces, including the power to confer use immunity on Moss (18 U.S.C. §6000, et seq.), and compel him to testify truthfully by the power of civil contempt, and the threat

of prosecution for false statements. 18 U.S.C. §1623.

Even under the more liberal New York state practice, where such inquiry of the witness would be permitted for impeachment on cross-examination, instances of prior misconduct are collateral matters not provable by extrinsic evidence. See People v. Webster, 139 N.Y. 73, 83-85 (1893); Richardson on Evidence, §510 (9th ed.).

Lastly, what good is the Gold statement? In these times of recorded and widely publicized Presidential and Congressional adulterers, massage parlors with neon signs, and street corner pandering, which claims constitutional protection, we suspect that many of our jurors selected within a fifty mile radius of Foley Square are licentious, or have friends who are. Moss neither raped nor seduced Miss Gold; the activities of these mature consenting adults would not, in our view, if known to the jury, impeach any witness. November cannot realistically have believed otherwise.

Subsequently, in a recorded telephone conversation on November 30, 1972, from Ostrer's office, Susan Gold told Moss that she did not want to "see" him until the federal trial was concluded. Miss Gold accused Moss of turning unfairly against his friend Ostrer,

and a discussion of financial losses that Moss had suffered in transactions with Ostrer ensued. Toward the end of this conversation, Ostrer returned to the office, discovered that Miss Gold was on the telephone with Moss, and instructed her to hang up.

In other recorded conversations, Ostrer had voiced his concern that people with whom he was associated should be careful in their dealings with Moss, since he might be recording any conversations with them.

Subsequent Actions of the D.A.'s Office.

Detective Walter Finley, an officer who was on duty at the monitoring plant on November 21, 1972 and overheard the Ostrer-November conversation, concluded that he was listening in on preparations to commit a crime. Finley was not aware that November was an attorney, and there is little in the substance or tenor of that conversation to suggest to an eavesdropper that this was a conference between an attorney and client. Concerned that there might be an attempt afoot to commit the state crime of Coercion, Finley discussed this information with his fellow officer at the monitoring plant, and with his supervisor. They then reported it to Assistant

District Attorney John Fine, who was in charge of the D.A.'s investigation. Fine was aware that November was an attorney, but nevertheless believed that the intercepted communication was evidence of preparation for a criminal act.[8/]

Defendant contends that the November 21st conversation does not demonstrate a plan to coerce Moss or to obstruct justice, and that subsequent intercepted conversations indicate, to the contrary, that Ostrer did not want any contact with Moss. Furthermore, defendant contends that the November 21st conversation must be understood as an innocent effort to prevent Moss from testifying falsely against Ostrer, and, rather than an obstruction of justice, any confrontation with Moss would have been designed to prevent Moss from testifying falsely.

Section 135.60 of the New York Penal Law provides in relevant part that:

> "[a] person is guilty of coercion in the second degree when he compels or induces a person ... to abstain from engaging in conduct in which he has a legal right to engage, by means of instilling in him a fear that, if the demand is not complied with, the actor or another will: ... [e]xpose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule."

See also, 18 U.S.C. §1503; United States v. Ciotti, 493 F.2d 1111, 1118-19 (2d Cir.), cert. denied, 419 U.S. 917 (1974).

No evidence appears in this record that Ostrer, November or persons associated with either of them actually attempted to intimidate or coerce Moss, and apparently, to the extent, if any, that a criminal act may have been contemplated, the plan never passed the discussion stage.

Ostrer contends that the November 30th Gold-Moss telephone conversation suggests that there was no plan to intimidate Moss. The inference, if any, to be drawn from this conversation is not so unequivocal. The same officer, hearing both the November 21st and November 30th conversations, would not necessarily conclude from what Gold said, that the plans which Ostrer and November had discussed had been abandoned.

Whether Ostrer, November or both of them actually violated federal or state law, or really planned to do so, need not be determined here. For our purposes, it is sufficient, and I find, that state law enforcement authorities believed in good faith that a criminal act to obstruct the federal prosecution appeared to be in preparation. Also, there was a reasonable basis in fact for their holding this belief.[9/]

On December 22, 1972, State Supreme Court Justice Jacob Grumet signed an amended order authorizing the continuation of electronic surveillance by state authorities (Ex. C). The amended order stated that there was now reasonable grounds to believe that evidence of Coercion in the first degree might be obtained through continued surveillance. In support of the state's application, Detective Finley submitted an affidavit reciting, among grounds for the expanded and continued surveillance, the Ostrer-November conversation of November 21, 1972.

Communications Between State and Federal Prosecutors.

Assistant District Attorney Fine was reasonably and properly concerned about what appeared to him to be the coercion of a prospective federal Government witness. On December 21, 1972, in the ordinary and regular course of his duties, Fine discussed the substance of the November 21, 1972 conversation with then Chief Assistant District Attorney Alfred Scotti, who also served as head of the D.A.'s Rackets Bureau. Fine told Mr. Scotti that there was an attempt to tamper with a federal Government witness by scaring him into giving testimony that would not be favorable to the Government, at the risk of having his adulterous relationship exposed.

Scotti and Fine agreed that the exertion of pressure of this nature upon a witness was improper. The state prosecutors concluded that they had a duty to alert the federal prosecutors so as to prevent an obstruction of justice. Scotti and Fine did not discuss recommending any course of action for the United States Attorney to pursue.

Although the state prosecutors determined that duty compelled their disclosure of the substance of their information and knowledge to federal authorities, they were equally concerned about maintaining the security of their investigation, and, in particular, the confidentiality of their electronic surveillance. Fine was under the wrong impression that an investigator employed by Ostrer [Lynch] had some current relationship with federal authorities. Scotti instructed Fine to advise the United States Attorney of the substance of the information without disclosing its source.

The D.A.'s people had an overriding interest in the protection of the secrecy of their surveillance. With reason, they regarded the United States Courthouse as a leaky ship. See, for example, In re Biaggi, 478 F.2d 489 (2d Cir. 1973), in which "authoritative sources" revealed the contents of secret grand jury

proceedings in this District to a newspaper. They [he] did so with impunity. And in United States v. Rosner, 485 F.2d 1213, 1217 (2d Cir. 1973), cert. denied 147 U.S. 950 (1974), a seasoned criminal practitioner concluded that a source in the federal prosecutor's office could, for money, supply helpful information. The Court of Appeals described what took place:

> "Rosner said he wanted 3500 material. Rosner told Leuci that he understood that there were four witnesses in the case and that 'two were good and two are bad,' and that he 'would' like to find out what two are good and what two aren't good.'
>
> Leuci told Rosner that although his contact had not yet established a price for the information Rosner wanted, Leuci 'would appreciate it if something were done' for his 'contact' in the United States Attorney's office, 'as soon as possible.' Rosner and DeStefano stepped away from the table and Leuci saw Rosner pass DeStefano some money. When they returned to the table DeStefano passed Leuci $400 under the table."

In the Rosner situation, those purporting to sell secret information were acting in an undercover capacity, but the fact that defendant there fell for their little act suggests such occurrences were not unheard of.

It was reasonable for Scotti and Fine to seek to discharge their perceived duty without risking the compromise of their own continuing efforts.

At the conclusion of their discussion, Mr. Scotti attempted to arrange a meeting between Fine and the Assistant United States Attorney in charge of the federal prosecution. Scotti first telephoned the United States Attorney for the Eastern District and was informed that Ostrer was not being prosecuted in that District.[10/] Scotti then called then Chief Assistant United States Attorney Silvio Mollo, of this District. Scotti told Mr. Mollo that an Assistant District Attorney had information that would be of interest to the Assistant United States Attorney on the Ostrer case. Scotti did not mention that the information involved a Government witness named Moss, nor that the source of his information was electronic surveillance.

Mr. Mollo conveyed this message to Assistant United States Attorney Harold McGuire, who was then in charge of the prosecution of Dioguardi and Ostrer, and instructed him to call Assistant District Attorney Fine because Fine had information relevant to the federal case. McGuire made an appointment to meet Fine in Fine's office the following day.

At the December 22nd meeting, Fine told McGuire, in substance, that Ostrer had certain information regarding Moss,

and expressed his fear that this information would be used to effect an obstruction of justice. McGuire testified, and I find, that Fine did not venture a recommendation concerning what McGuire should do with this information, since it was apparent that Fine did not know anything about the federal case. McGuire told Fine that he did not have to worry about an obstruction of justice, because it was not McGuire's present intention to call Moss as a witness, at least, not as part of the Government's direct case.

McGuire had previously read Moss' August 13, 1970 testimony before the Securities and Exchange Commission ("SEC") and his March 13, 1971 testimony before a federal grand jury. McGuire also interviewed Moss at the United States Attorney's Office on November 21, 1972.[11/]

Moss had testified previously that he did not know that the price of the stock of Belmont was being manipulated, and had invested in it on Ostrer's advice, because he believed that Belmont was a good investment. McGuire, familiar with Belmont and its meteoric price history, did not believe Moss' testimony, and determined that Moss would not be helpful as a Government witness. McGuire reached this conclusion independently and prior to meeting

with Fine or being informed that there appeared to be an effort to intimidate Moss.

Fine did not disclose that the information regarding Moss had been obtained from electronic surveillance or from a conversation between Ostrer and November.[12/] Fine testified that he believed that McGuire inquired of him as to the source of this information, but that Fine declined to disclose his source. Before ending their discussion, Fine encouraged McGuire not to do anything differently in the preparation of his case. Fine's unstated reason for this advice was that he did not want to alert the federal defendants, or any of the additional subjects of his own investigation, to the existence of the electronic surveillance.[13/]

Detective John O'Rourke, one of the police officers present for at least part of the meeting between Fine and McGuire, testified that Fine told McGuire that there was a security problem within the United States Attorney's Office because Jim Lynch, who was or had been an FBI Agent, was associated with Ostrer. McGuire did not recall that he was informed of this by Fine. Lynch's employment had no bearing on the issues in Ostrer's trial, and knowledge of the fact that Lynch was associated with the Ostrer

defense was not used by the Government to Ostrer's detriment, nor could it be.

Before concluding his discussion with Fine, McGuire asked whether Fine was in possession of any material that would be useful for the cross-examination of Ostrer. McGuire did not succeed in gaining information useful for this purpose, other than to obtain a certified copy of Ostrer's prior state judgment of conviction and the transcript of his plea to those charges, both matters of public record.

Following the meeting with Fine, McGuire instructed an SEC investigator to contact Moss to be certain that Moss was under subpoena for the trial. Fine's diary entry for December 29, 1972 (Ex. B) shows that on that date Fine telephoned McGuire to inquire whether Moss was under subpoena for the Belmont trial. Fine recommended that the subpoena remain in effect. McGuire was willing to keep Moss under subpoena to accommodate Fine, and because he could not be certain that some circumstance might not develop at trial making Moss' testimony significant. Furthermore, McGuire testified, and I find, that he wanted to conceal the fact that Michael Hellerman, a co-conspirator and co-defendant on this indictment, would testify and be the lynchpin of the Government's case.

There was no further contact between state and federal law enforcement authorities prior to the federal trial.

On February 21, 1973, after a verdict was returned in this case, the state authorities terminated surveillance and searched Ostrer's office pursuant to a warrant. On April 18, 1973, Fine and McGuire conferred again. Then, for the first time, Fine informed McGuire of the electronic surveillance, and that the information regarding attempted coercion of Moss had been obtained from an intercepted conversation between Ostrer and November.

The Trial.

On January 4, 1973, the trial of Dioguardi and Ostrer on this indictment began before Chief Judge Edelstein of this Court and a jury. A full exposition of the facts adduced at trial appears at 492 F.2d 70 (2d Cir. 1974) with which familiarity is assumed. We discuss the evidence below only with regard to the case proved against Ostrer.

The case against Ostrer was presented primarily through the testimony of Hellerman, the chief manipulator in the Belmont scheme. Hellerman described the scheme by which the price of Belmont

was to be manipulated from $5.00 or $6.00 per share in January 1970 to approximately $50.00 per share in May of that year. Hellerman testified that he offered Ostrer the opportunity to buy a portion of the Belmont stock issue at $15.00 per share, with the understanding that Hellerman would receive one-half of the profits and would guarantee Ostrer against any loss. Ostrer committed himself to purchase 14,000 of the approximately 28,000 outstanding shares at a cost of $210,000.00. Hellerman made arrangements to have others purchase the remaining 14,000 shares.

The other individuals whose participation Hellerman secured were able to pay for their shares, but Ostrer was unable to raise the $210,000.00 that he had committed himself to raise, and the selling brokers were waiting for his payment. Hellerman arranged, through Dioguardi, for Ostrer to borrow $60,000.00 from an organized crime figure, one Hickey DiLorenzo, at 1 1/2% interest per week. Hellerman himself advanced Ostrer over $52,000.00 to cover Ostrer's obligation on 3,500 shares of stock. Ostrer, still having difficulty raising the balance that he owed on these shares, sought other financial sources.

Hellerman testified that Ostrer had mentioned several people to whom he was attempting to sell a portion of his allocated

shares. One of the persons mentioned who was considering purchasing a portion of Ostrer's commitment was Aubrey Moss.[14/] Hellerman, on cross-examination by Mr. Edelbaum, Ostrer's trial counsel, testified that he understood that Ostrer had an agreement with Lee Evins to purchase a portion of Ostrer's allocation, and that Ostrer would guarantee Evins against loss, and would share in Evins' profits. Hellerman also testified that Ostrer had an agreement with Fred Flatow for the purchase of shares.

In May 1970, the manipulation scheme failed when, without notice to the manipulators, the President of Belmont sold his "investment" stock through non-participating brokers. The market was unable to absorb this influx of shares. Hellerman was unwilling to purchase the shares himself, and unable to find other purchasers at the now inflated price. The market for Belmont stock collapsed, and Ostrer and others were left with considerable losses.

Ostrer attempted to hold Hellerman responsible for his losses, and Dioguardi subsequently arbitrated their dispute.

Ostrer contends on this motion that had Moss testified as a Government witness, his testimony on cross-examination would have been helpful to the defense, and that but for the intrusion on his

conversations with counsel, the Government would have blundered into calling Moss as a witness.

Moss would have testified that he purchased 2,000 shares of Belmont stock from Ostrer for $30,000.00 with the agreement that he and Ostrer would split the profits "50-50" and that Ostrer would hold Moss harmless against any loss. Prior to trial, Mr. Edelbaum had seen a copy of a written agreement memorializing this understanding between Moss and Ostrer. Mr. Edelbaum testified at the evidentiary hearing that, if Moss were a witness, Edelbaum would have laid a proper foundation for the admissibility of the written agreement. Ostrer suggests that this evidence would have cast serious doubt upon the truthfulness of Hellerman's testimony, in that it would have demonstrated that Ostrer had agreed to give half of his profit to Hellerman and the other half to Moss, leaving Ostrer with no share in the fruits of the conspiracy. It is contended that Ostrer's arrangements with Evins and Flatow were similar in all respects to the arrangements with Moss.

In fact, at trial, the Government did not call Moss or Evins as a witness; Flatow had died prior to the trial. Ostrer now claims he was faced with a dilemma whether to call Moss, Evins or

both as defense witnesses.

Mr. Edelbaum testified that he had decided against calling Moss as a witness for the defense for two reasons. First, Mr. Edelbaum did not trust Moss, based upon (1) Edelbaum's impression of Moss' demeanor in a pre-trial meeting with Moss in Edelbaum's office, and (2) the fact that Edelbaum had been told that although Moss had made statements consistent with Ostrer's innocence, he had made other statements indicating that he bore a grudge against Ostrer. Furthermore, Edelbaum knew that Moss had testified about Ostrer before the federal grand jury, but did not know the substance of that testimony. Edelbaum realized that if he called Moss as his own witness, he would not have access to the grand jury testimony but that if the Government called Moss, all his prior statements and secret grand jury testimony would be available to him on cross-examination. 18 U.S.C. §3500.

The latter reason applied with equal force to Evins who had also testified prior to trial in the grand jury.

No application was made to have the Court call Moss as a Court witness.[15/] It also appears that no effort was made to authenticate, and thereby render admissible, the Ostrer-Moss written

agreement by proffering the testimony of persons familiar with the signatures of Ostrer and/or Moss, or the testimony of a handwriting expert.[16/] Finally, the record does not indicate that there was any request for the Government to stipulate to the authenticity of the written document without there being a foundation laid by live testimony.

As noted earlier, on January 26, 1973, following more than two days of deliberation, the jury found Ostrer guilty on eleven of the counts submitted to it for its deliberation, acquitting him as to six counts.

The Fourth Amendment Claim.

It has been stipulated for purposes of this motion that the surveillance conducted by state law enforcement authorities was in violation of Ostrer's Fourth Amendment rights. Although the constitutional invalidity of this eavesdropping is not in dispute, it is worth noting why it was unlawful.

On February 4, 1975, after Ostrer's federal conviction, in People v. Brown, (Ind. No. 1392/1973, Sup. Ct., N.Y. County, Pt.42), a New York state court held that prior wiretap and eavesdropping orders

for the residences of Anthony Salerno and Joseph Moretti, issued on August 30, 1971 had been granted absent an adequate showing of probable cause. The conversations intercepted during this Salerno-Moretti surveillance had served as the basis upon which a number of further eavesdropping warrants, including the warrant for Ostrer's office, were granted. Thus Ostrer's wiretap and all it disclosed was "fruit of the poisonous tree." Wong Sun v. United States, 371 U.S. 471 (1963).

As we have found, Fine did transmit information to McGuire that he derived from the eavesdropping on Ostrer's conversations later found to be unlawful. Cooperation between state and federal law enforcement officials is contemplated by both federal and state statutes, 18 U.S.C. §2517 and N.Y. Criminal Procedure Law §700.65, and acting upon the justified supposition that the surveillance was conducted lawfully pursuant to warrants, the communications between the two prosecutors were proper. See United States v. Manfredi, 488 F.2d 588 (2d Cir. 1973), cert. denied 417 U.S. 736 (1974); United States v. Forlano, 358 F.Supp. 56 (S.D.N.Y. 1973). Under these circumstances, where one prosecuting authority had reason to believe that there was an attempt to tamper with a witness in a prosecution in another jurisdiction, such communications are essential and should

not be discouraged. The scope and extent of the communication were severely limited to that sufficient to satisfy the necessities.

The issue upon this motion is to what extent, if any, did the unlawful state surveillance taint the federal prosecution. Defendant must bear "the initial burden of producing specific evidence demonstrating taint in a substantial portion of the Government's case against him," although the Government "has the ultimate burden of persuasion to show that its evidence ... was not tainted through a connection to the illegally procured wiretap information." United States v. Sapere, 531 F.2d 63, 66 (2d Cir. 1976). See also Alderman v. United States, 394 U.S. 165, 183 (1969). For reasons to be elaborated further below, the Court finds that the defendant has failed to satisfy the initial burden, and, even if it were to be assumed, solely for the argument, that he has made the requisite showing, the Government has amply demonstrated that the trial was conducted and that the evidence upon which Ostrer was convicted was derived "by sufficiently different or distinguishable means to be pure or 'purged'" of the primary taint. United States v. Sapere, supra, at 64, n. 1. See also Wong Sun v. United States, supra, at 487-88.

The Sixth Amendment Claim.

Defendant claims that by means of this unlawful surveillance, the Government intruded upon his attorney-client relationship with November, and thereby violated his Sixth Amendment right to the effective assistance of counsel in the federal trial. Defendant urges this Court to apply a per se rule against which this conviction could not stand. See Black v. United States, 385 U.S. 26 (1966); O'Brien v. United States, 386 U.S. 345 (1967).

However, the application of such a per se rule has been reserved for those instances where the conduct of the Government has been "manifestly and avowedly corrupt." "The per se rule represents a moral as well as a legal condemnation of such egregious and unequivocal conduct for which sanctions are imposed against the Government as punishment regardless of the defendant's guilt." United States v. Gartner, 518 F.2d 633, 637 (2d Cir. 1975).

The circumstances surrounding this intrusion do not suggest that the federal Government or the D.A. has acted culpably. What occurred here was not a purposeful intrusion designed to infiltrate the defense camp and spy on its strategies. To the contrary, this was an incidental intrusion by state authorities completely unfamiliar with this federal prosecution.

The actual intrusion was committed by state authorities, acting pursuant to a warrant signed by a state judge, and believing that an adequate showing of probable cause had been made. In fact, there may have been an adequate showing of probable cause, however the predicate for that showing was derived from prior unlawful surveillance of others.

The initial eavesdropping on Ostrer was by a detective who did not know that one participant was an attorney, or that the attorney was acting for Ostrer in this matter. Although Assistant District Attorney Fine knew that November was an attorney, he believed that November was engaged in a criminal act.

Under familiar principles of law, the counselling of the commission of a crime or fraud is not encompassed by the attorney-client privilege.[17/] Fine disclosed to Assistant United States Attorney McGuire only the minimum information necessary to avert the perceived obstruction of justice.[18/]

The state authorities proposed the meeting without suggesting that their investigation was electronically derived, or involved an attorney. At the time they neither knew nor had reason to know that the Ostrer eavesdropping warrant was invalid.

The state authorities were motivated solely by a high-minded sense of ethical obligation to insure proper and unobstructed administration of federal criminal justice. McGuire did not know that this information was derived either from electronic surveillance or from a privileged communication between attorney and client. See generally United States v. Brown, 484 F.2d 418 (5th Cir. 1973), cert. denied 415 U.S. 960 (1974).

The Court has had an opportunity to listen to and observe the demeanor of the witnesses upon this hearing, specifically, McGuire, Fine, Mollo, Scotti and Edelbaum. The Court regards these witnesses as high-principled and truthful men. Essentially, defendant's motion is founded on suspicion, not borne out by facts. If everything which the D.A.'s policemen did record or could have recorded which occurred in Ostrer's office prior to verdict had been transmitted fully and immediately to McGuire, our view of this motion would be different. But it wasn't. Instead, all that McGuire was told by the D.A.'s people was that Ostrer and others were trying to tamper with the federal witness "Morse." He was not told how, nor how the D.A. knew. There was no basis for McGuire to infer that the information was derived from electronic surveillance, much less that it came from illegal or tainted sources. Indeed, usually such material comes from confidential informants. While McGuire, now a private practitioner,

is apparently indignant that Ostrer still walks the street, this bias or attitude did not color his testimony and I find him a truthful witness.

The per se rule is regarded as a rule of deterrence against Government lawlessness. As the Supreme Court had noted in a different context,

> "[t]he deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right .... Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force." Michigan v. Tucker, 417 U.S. 433, 447 (1974).

At each step in this limited transmission of information, the official action, state and federal, was pursued in complete good faith. There is no single act of misconduct or negligence, repetition of which must be deterred; rather, a rule of deterrence would only serve to chill necessary communications between state and federal law enforcement authorities. Under the circumstances of this case, application of the per se rule would be undesirable and inappropriate.

In the absence of any evidence that the Government engaged in misconduct warranting the imposition of the sanctions inherent in

the per se r e, the Court must consider and determine whether the defendant was in fact prejudiced by this intrusion.

The Claims of Prejudice.

The prejudice claimed here is not what occurred at trial, but rather what did not occur; not in the evidence that was presented, but in the fact that Moss was not called as a Government witness.

Ostrer contends that but for the intrusion on his conversation with November, the Government to its tactical detriment, would have called Moss as a witness on its direct case. This contention is contradicted by the credible testimony of McGuire and Fine that, even prior to their meeting, McGuire had decided that it would not be necessary or desirable to call Moss as a witness. On the basis of Moss' prior testimony and McGuire's own interview, McGuire determined that Moss was not being truthful and would be a dangerous witness.

All that the Government could hope to achieve through the testimony of Moss was established by the credible testimony of Hellerman.

Ostrer contends that following Hellerman's cross-examination, the Government's case was in jeopardy, and that, if McGuire had not

been counselled otherwise by Fine, McGuire would have reconsidered his trial strategy, and called Moss to bolster the Government's case. McGuire testified, and I believe, that nothing occurred to change his trial plans, and the jury's verdict bears out McGuire's assessment. We, therefore, find that McGuire did not rely upon Fine's information in deciding not to call Moss as a witness, or in adhering to his prior decision not to do so.

Assuming solely for the argument, that McGuire reached his decision not to call Moss based upon Fine's information, any prejudice to Ostrer was not such as to warrant a new trial. As noted previously, the defense could have called Moss as a witness, or requested the Court to do so. Mr. Edelbaum testified perceptively to the dangers to Ostrer of calling Moss as a defense witness. Assessing these dangers, as against any likely benefit to result from Moss' testimony, Mr. Edelbaum exercised the wise professional judgment attained by more than forty-five years of active and successful criminal defense experience.

This renowned advocate concluded that calling Moss as a defense witness was too perilous. Instead, Mr. Edelbaum cross-examined Hellerman about the agreement with Flatow and Evins, and

impliedly, Moss. His strategy was well thought out and, in all respects, professionally executed. In another exercise of defense strategy, Ostrer elected not to testify in his own defense. Mr. Edelbaum's judgment is not to be maligned simply because his client was convicted.

Furthermore, Moss' testimony would not necessarily have been exculpatory of Ostrer. Just as McGuire believed that Moss was not being truthful in stating that Ostrer did not tell him that Belmont stock was being manipulated, so Ostrer, November and Edelbaum each feared that Moss would falsely inculpate Ostrer. In recorded conversations, Ostrer speaks generally of the need to discredi Moss' testimony (Exs. T-2, K).

We assume that Moss would have testified that he purchased 2,000 shares pursuant to a written agreement that he and Ostrer would share profits "50-50" and that Ostrer would guarantee him against loss. Proof of such an agreement would compel the inference that Ostrer had reason to believe that there would be no loss. In view of the already inflated price at which Belmont was selling, this inference would be consistent with the Government's theory, and suggest that the stock was being manipulated, and Ostrer knew it.

Why else would he, as an experienced businessman, sign such a paper?

The "50-50" provision of this agreement, when considered together with a similar agreement with Hellerman, would have demonstrated that Ostrer gave up all profit, but did so only as to these 2,000 shares, and presumably the 4,000 shares sold to Evins and Flatow under similar terms. According to the testimony of Hellerman, Ostrer had committed himself to purchase 14,000 shares. Ostrer was able to raise enough money to control approximately 8,000 shares. Since the success of the manipulation depended upon control, by the conspirators of all the outstanding shares, it was imperative that the remaining shares be purchased; if not by Ostrer himself, then by persons who would follow his instructions. To park these shares, and insure the success of the entire manipulation, and to protect his share of the profit in 8,000 shares, Ostrer could well afford to forego all his participation in profits on the other 6,000 shares and indemnify losses.

Ostrer could agree to hold his purchasers harmless because the terms of his agreement with Hellerman provided him with indemnification against loss. Thus, although Moss' testimony certainly would have been relevant, it may not have exculpated Ostrer in the minds of the jurors. Rather, it might have shown guilt.

To summarize in this regard, defendant has failed to demonstrate that the unlawful surveillance or the intrusion upon his privileged communications tainted this prosecution. Primarily, this is so because only the most limited product of the surveillance, i.e., that they were planning to tamper with Moss, passed from the D.A.'s people to the federal prosecutor.

Before December 22nd, McGuire had determined independently not to call Moss as a witness. To the extent, if at all, that Fine's information confirmed McGuire's preconceived decision not to call Moss, or to the extent, if at all, that McGuire resisted the temptation to call Moss as a witness after the cross-examination of Hellerman, I find that the defendant was not prejudiced. If we are to assume that Moss was to provide affirmative evidence for the defense, the defendant could have called Moss, or introduced the written agreement or done both.

Merely because the defendant was faced with a difficult strategic choice, the implications of which were well known to defense counsel, does not mean that the Government's conduct deprived Ostrer of a fair trial.

The Government evidence actually adduced at trial was not

derived from the unlawful surveillance, nor from the intrusion upon any attorney-client conversation. The proof against Ostrer was substantial, if the jury found the testimony of Hellerman credible, as indeed it must have done in order to have returned these guilty verdicts.

Effect of the Testimony of Moss.

Defendant has styled this motion as a motion for a new trial based upon newly discovered evidence. The newly discovered evidence is the fact of unlawful state surveillance, followed by a state-federal conversation. Were we to consider Moss' testimony itself as the "new evidence" basis for this motion, rather than the circumstances surrounding the surveillance, we find no merit to this motion.

> "To succeed on such a motion a defendant must show, inter alia, (1) that the evidence was discovered after trial, (2) that it could not, with the exercise of due diligence, have been discovered sooner, (3) that it is so material that it would probably produce a different verdict." United States v. Slutsky, 514 F.2d 1222, 1225 (2d Cir. 1975).

Moss' testimony fails to satisfy these criteria. The defense knew of the agreements between Ostrer and Hellerman and

between Ostrer and Evins, Flatow and Moss prior to trial. Moss and the written agreement were available to the defense.

It can hardly be said that Moss' testimony would have produced a different verdict. As previously noted, Moss' testimony regarding the agreement, rather than refuting Hellerman's testimony, was consistent therewith, and also consistent with the Government's theory of the case.

Bail Pending Further Proceedings.

Initially, the Court believed that defendant was and continues to be enlarged on bail pending determination by the District Court of this motion for a new trial, pursuant to an order of the Court of Appeals dated December 17, 1974. The aforementioned Court of Appeals order continues bail for "24 hours after a decision by the United States District Court on the motion for new trial, or until the next panel of this Court is available to hear any subsequent bail application, whichever is the later of those two dates."

This portion of the December 17th order is somewhat puzzling. Mr. Dershowitz, defendant's counsel on this hearing

stated (Tr. p. 514) "I take it is still open under the Court of Appeals ruling, whether to grant or deny bail in the event that the motion is turned down...."

Apparently, the Government disagrees, and presumably bases its disagreement upon reasoning based upon the rule found in footnote 11 of United States v. Ellenbogen, 390 F.2d 537, 541 (2d Cir.), cert. denied 393 U.S. 918 (1968). See United States v. Rosa, 372 F.Supp. 1341 (S.D.N.Y. 1974) for detailed discussion of the Ellenbogen rule, which this Court believes would be abrogated by our Court of Appeals upon a re-examination. Alternatively, the Government may regard the order of December 17th as "law of the case," and reads into it an implied negative, to the effect that the trial court could not continue the bail beyond the 24 hour period, or the availability of the next panel, whichever is later.

I conclude that the District Court has jurisdiction to enlarge Ostrer's bail pending appeal from this order, and also has jurisdiction to deny bail, subject only to the fact that such denial would be stayed for the 24 hour period.

Addressing the merits of Ostrer's desire for bail, it seems appropriate that he should continue to be enlarged pending appellate finality.

First, in connection with this non-violent crime, Ostrer has at all times honored the terms and conditions of his bail, and has made himself available whenever required, during a period of almost five years since this indictment was filed. His attendance at court before me at required conferences prior to the hearings, and also during the hearings, was prompt, regular and orderly.

While the facts adduced in evidence do not rise to a level which would justify granting any substantive relief on this motion, nevertheless Ostrer's claims are colorable, and the issues tendered arise in a sensitive area affecting the fundamental constitutional rights of persons charged with crimes. He is entitled to litigate these issues on the merits prior to his incarceration.

If the foregoing factors alone are deemed insufficient to warrant enlarging defendant on bail pending appellate finality, we add a general observation applicable to all convicted criminals except those whose liberty directly threatens the public peace, or who show propensity for flight. Ostrer is a mature person, whose sentence has the primary purposes of general deterrence, and specific deterrence. To the extent that our federal prison system can do anything for a convict, and we think it can, the benefits of

incarceration depend upon the prisoner adjusting himself to the highly structured society of the institution, and participating fully and willingly in the educational programs and the prison industries. Before the average man will do this, all hope must be removed, except the hope of earning good time or early parole.

A prisoner who has his mind on his pending writs devotes all of his energy and thought to pending collateral attacks upon his conviction, and gains no benefit from any of the programs in the prison. Such a man is a disruptive factor for those who do not have pending writs, and has no incentive to throw himself into the many voluntary programs and make the best use of his time. Generally, we would be well advised to restructure our judicial system so as to gain early finality of judgments, and whenever possible defer imprisonment until such finality has been reached.

For all of the foregoing reasons, and because we cannot say that this motion was in any sense frivolous, or dilatory, defendant is continued on his existing bail pending appellate finality, unless the Court of Appeals shall direct otherwise, or shall interpret its December 17, 1974 order so as to represent a clear withdrawal from this District Court of the power to enlarge

defendant upon such bail. We do not so read that order.

So Ordered.

Dated: New York, New York
June 4, 1976

CHARLES L. BRIEANT
U. S. D. J.

F O O T N O T E S

1. In addition to the conspiracy charge, Ostrer was convicted of the substantive crimes of (1) causing a sale confirmation for stock of Belmont Franchising Corporation to be placed in the mail in furtherance of a fraudulent scheme for the sale of stock, in violation of 15 U.S.C. §§77q(a), 77x; (2) causing purchase confirmations for such stock to be placed in the mail as part of a manipulative device in connection with the purchase or sale of a security in violation of 15 U.S.C. §§78j(b), 78ff and Rule 10b-5, 17 C.F.R. §240.10b-5; and (3) use of the mails as part of a scheme to defraud in violation of 18 U.S.C. §1341.

2. This indictment was filed on May 27, 1971. On June 1, 1971 Ostrer was arraigned and pleaded not guilty.

3. In one intercepted telephone conversation regarding these checks, Ostrer misrepresents himself as being an attorney named Mr. Levine, associated with the law firm of Julius November.

4. November attempted to have intelligent discourse with Edelbaum, who treated his client Ostrer, and November, with uniform patience and courtesy. To such an experienced advocate as Edelbaum, November was useless. The relationship was described

by Edelbaum as follows (Tr. p. 347):

"Q Did you confer with Mr. November in connection with the criminal case against Louis Ostrer?

A I did.

THE COURT: Did you retain Mr. November to assist you in any fashion?

THE WITNESS: No. Mr. November was Mr. Ostrer's civil attorney and handled many of his civil affairs. He was very interested in the criminal case and he was very interested in what we were doing and I would confer with him and tell him and ask him certain questions of what he may have known of the case.

Q Did Mr. November on occasion, during the course of the criminal trial confer with you at counsel table?

* * *

A On a few occasions he came to the table.

THE COURT: When did you first commence to confer with Mr. November about this indictment?

THE WITNESS: Oh, I think I conferred with him in November or early December of 1972, your Honor. It was somewhere in that area."

5. Unless otherwise indicated, all reference to exhibit numbers are to exhibits introduced at the evidentiary hearing upon this post-trial motion.

6. The Government did not obtain Gold's statement (Ex. BB) until after the verdict was returned in this case. The statement was provided to the United States Attorney by state law enforcement authorities who seized the statement in a search of Ostrer's office on February 21, 1973. This search was conducted pursuant to state warrant, but the warrant was issued based upon information obtained through the unlawful electronic surveillance. For purpose of our inquiry here, what is relevant is what was known prior to conclusion of the federal trial; necessarily, this is limited to the conversations overheard by the electronic surveillance, to the extent disclosed to the federal prosecutor, and does not include the Gold statement document itself.

7. The tape of the conversation, a transcript of which was also received (Ex. T-3), includes the following:

> "November: What I'm saying, this poor girl [Susan Gold] is crying, say Jesus Christ this will get me in. What girl would go out and do like this girl? This fuckin Moss is ruined. He ever takes the witness stand, he's wrecked all over. Read this shit. Read it.
>
> Ostrer: Jules, I understand that.

November: Let it go.

Ostrer: What do you want me to do, give her a $400 raise?

November: Nah. She wants a stinking $10.

Ostrer: What are you talking about Jules?

November: The girl is in tears, you have her hung around here 3 or 4 hours.

Greenfield: Ah, she's ah, listen I'll

November: Cut out all this shit Louie.

Greenfield: Don't worry about that, we'll take care of her.

* * *

November: Talk is cheap, read that will ya please, (inaudible)

Ostrer: He [Moss] told her [Gold] he's taking the stand.

November: He won't take the stand with this, he can't afford to. He'd be disgraced.

Ostrer: But isn't, isn't this blackmail?

November: No. Where's the blackmail?

Ostrer: It's not?

November: Nobody will be around, we know who the hell, if she's sitting with him in a restaurant, he's gonna be wired? This is blackmail?

Ostrer: Is this intimidation? (inaudible)

November: No, no, you're entitled, don't you understand why I'm doing this? In case he gets to her. Then you can use this, that she gave a statement. In other words, you can attack the witness' credibility. The guy's a whoremaster. He's running around, he took her all over the fuckin world. A married man bought her all the shit and she's a single girl, right?

Ostrer: She would have to take the stand, wouldn't she?

November: This is credibility. But let's assume that somebody reaches her. She says no. And I say to her do you recall that you came and said to me, and said Jules or Mr. November, I feel terrible here's what Moss is going to do. I don't want to be a buffer, and I said to you well you know you're keeping company with the man, would you give me a statement? She says, she thought she said, yes, I'll be glad to give you a statement. Understand, that's what this is for, don't you understand? But if he got wind of the fact, that she's gonna testify to the relationship. (Inaudible). He's destroyed if he's cross-examined on this shit.

Ostrer: But he went down there [to the U.S. Attorney] today right?

November: That's what he said.

Ostrer: He probably gave them a statement under oath.

November: I don't think he gave it to them under oath. I don't think so.

Ostrer: He told her he's gotta be a witness.

November: Aw well that's language she doesn't understand he's got to be. He don't have to be. But I think he's destroyed, but as you say, what you also got the other thing on him he gave back the stock....

* * *

Ostrer: You're playing with fire.

November: You play with fire. It's dangerous here you're intimidating, you're extorting, in other words, if a guy has something against me, and he says November you know, if you don't do so and so I'm gonna do so and so, then you commit, you can't do that. That's why I purposely left him out. He was he was a party to the whore .... He's married? He was a party to this whoremastery too. But she said he didn't take anybody. Chicago he took her up to (inaudible) he gave her that set (inaudible), a color set (inaudible). Because I said you got to be careful, you can't make it too vivid or people will say to you, what are you a girlfriend of Mr. Ostrer, you follow me? Now I put in there that, it ran over, you know what I mean, she saw later that the man was running away with himself. He's destroyed. Here's that, here's that, the jury will say he's a fuckin' whoremaster.

* * *

Ostrer: That's, that's, credibility of a witness you say?

November: Anything that tends to show credibility. The Court of Appeals has ruled time and time again, anything that (inaudible)

Kilroy: Louie, pick up the phone.

November: He's a whoremaster.

Ostrer: Hello, Hello.

November: He's a (inaudible). He's a cheater. Any may who is a whoremaster, a cheater, a ma of disrepute, is not worth a, anything that shows he's a (inaudible).

Ostrer: Why don't you keep a copy?

Kilroy: I don't want a copy.

November: No, don't give him a copy (inaudible).

Kilroy: As far as I am concerned, there was no copy made (inaudible).

November: You can keep a copy, give him the original.

Kilroy: Who do you want the other copy to go to?

November: (Inaudible) put it away in the safe in case something happens. Alright? Don't tell Edelbaum about it till it comes up, at that point if you find out Moss, you didn't get a bill of particulars, I knew you couldn't get that anyway. You tell Edelbaum that that he's gonna have Suzy as a witness and that Suzy voluntarily, you know, is gonna be a witness, that she gave you a statement, give him a copy of it.

* * *

November: Nah. I don't think he takes the stand, what do you think of that?

Ostrer: How do you get to him to let him know you got this?

November: Well, then, in that case, I guess, you see, (inaudible) let's hear what he talks to her about tomorrow.

Ostrer: Cause we got to be very, very, very, careful with this.

November: Yeah, she may then later on tell him, listen, if you gonna take stand, Aubrey, you hear.

Ostrer: Yeah, go ahead.

November: Then so as a decent human being, no matter what it could do to me, I have got to show what a low skunk you are. Follow me?

Ostrer: Yeah, go ahead.

November: I don't think he's gonna take the stand. What do you think of that? You've got dynamite here, as you put it yourself. Now we have to talk at length here probably Friday or Monday, (inaudible)."

8. We observe that "[a]ttorneys, unlike Calpurnia, are not necessarily always above suspicion." United States v. Tramunti, 513 F.2d 1087, 1103 (2d Cir.), cert. denied 44 U.S.L.W. 3201 (October 7, 1975).

9. Defendant contends that, since neither federal nor state authorities later initiated prosecution of criminal charges based on this conversation, they did not entertain a good faith belief that the plans discussed were unlawful. The Assistant United

States Attorney who tried this case testified that there were discussions within the United States Attorney's Office whether an indictment should be sought for violation of 18 U.S.C. §1503 [the federal obstruction of justice statute]. They concluded that, at most it was an attempted obstruction of justice. As a result of the discussion, it was determined that such a prosecution would be a poor allocation of resources because Ostrer was already convicted on the instant charges, and the case would be difficult to prove. That a prosecutor, in the proper exercise of his discretion, ultimately decided not to prosecute does not imply that there was no reasonable basis for an investigation of suspected criminal activity.

10. The limited meaning and effect of the surveillance is shown by the fact that the D.A.'s Office did not even know where the case was pending.

11. A subpoena to appear as a Government witness, dated November 30, 1972, was served on Moss. (Ex. 12). This service was effected on December 20, 1972, and Moss continued to be under subpoena throughout the federal trial. McGuire did not interview Moss again after November 21, 1972.

12. McGuire did not know that November was the source of this information. McGuire certainly knew that November was an attorney. See November v. Time, Inc., 13 N.Y.2d 175, 244 N.Y.S.2d 309, 310 (1963), a defamation case in which McGuire was an attorney for the defendant.

13. The purpose of doing this was to prevent anything which would compromise the wiretap.

14. Some indication of the peripheral importance of Aubrey Moss to this case is that Hellerman, the prime mover in this scheme, identified Moss as "Harry Morse" (Trial Tr. p. 815), Hellerman did not know first-hand whether Moss had purchased a portion of Ostrer's shares, or on what terms.

15. Although rarely invoked, the Court, in its discretion, may call a person as a court witness. See Rule 614, F.R.Evid., which is declaratory of pre-existing law. Although Rule 607, F.R.Evid., now relieves the proponent of a witness' testimony from "vouching for" its credibility, the rule in this District was otherwise when this case was tried.

16. The document might have been authenticated by either course. McCormick on Evidence §221 (1972); see also Rule

901, F.R.Evid., and Advisory Committee Notes. The relevance of the document should have been apparent on its face.

17. "Since the policy of the privilege is that of promoting the administration of justice, it would be a perversion of the privilege to extend it to the client who seeks advice to aid him in carrying out an illegal or fraudulent scheme. Advice given for those purposes would not be a professional service but participation in a conspiracy. Accordingly, it is well settled under modern authority that the privilege does not extend to communications between attorney and client where the client's purpose is the furtherance of a future intended crime or fraud." McCormick on Evidence §95, at 199 (1972).

18. Ostrer contends that there was significant intrusion upon his strategy sessions with November. I decline to so find. To the extent that strategy was overheard, there is no evidence that there was a massive transmission of defense strategy to the federal prosecutor. Although in at least one intercepted conversation there was a discussion of whether Ostrer would testify, and the conclusion expressed that in a jury trial he could not, this was apparently not discussed by Fine and McGuire, since McGuire was still seeking information from state public records for the cross-examination of Ostrer on his prior convictions. All that Fine told McGuire out of all of this was to watch out because they were trying to coerce "Morse."

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA, :

-v- :

LOUIS OSTRER, :

Defendant.

----------X

71 Cr. 558-CLB

NOTICE OF APPEAL

Notice is hereby given that Louis Ostrer, the above-named Defendant, hereby appeals to the United States Court of Appeals for the Second Circuit from the order of the District Court denying his Motion For A New Trial, which order was entered in this action on the fourth day of June, 1976.

By his Attorneys,

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CERTIFICATE OF SERVICE.

Clerk
United States Court of Appeals
for the Second Circuit
United States Courthouse
Foley Square
New York, New York 10007

Date: September 13, 1976

Dear sir,

Herewith are 25 copies of the brief and 10 copies of the appendix (in three volumes) for:

Defendant-Appellant

No. 76-1282

UNITED STATES OF AMERICA

v.

LOUIS C. OSTRER

We certify that we have served 2 copies of the brief and appendix upon each other party separately represented, by hand, addressed as follows:

Laurence B. Pedowitz, Esq., Assistant United States Attorney, Office of the U.S. Attorney, One St. Andrew's Plaza, New York, New York 10007

Signed under the penalties of perjury:

George D. Bateman

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BATEMAN & SLADE, INC.

Then personally appeared before me the above named George D. Bateman, of Bateman & Slade, Inc., and made oath that the foregoing is true.

Francis D. Cozza
Notary Public
My Commission expires:
June 18, 1983